THE

Specific Performance of Contracts

AN EXPANSION OF AN ARTICLE IN

THE ENCYCLOPÆDIA OF THE LAWS OF ENGLAND

BY

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TO

THE RIGHT HONOURABLE

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SOMETIME A LORD JUSTICE OF APPEAL.

PREFACE.

It goes without saying that this little volume does not seek to enter the lists as a competitor for the favour of the profession with the standard treatise on Specific Performance, which so long has held the field in the region of the law which it has made its own.

But it is thought that there may be room and use for a concise text-book, which aims at discharging the modest function of a finger-post.

For, indeed, it is not difficult to lose one's way, in the investigation of a subject whose landmarks are scattered over an immense and ever-widening expanse of Reports, where principles are in risk of becoming buried under their illustrations, and rules of being lost in a maze of instances and exceptions.

The method employed in the following pages has been, as regards citation of authorities, one of rigorous selection. The cases referred to are comparatively few, but endeavour has been made

to pick out those which most distinctly enunciate the propositions in support of which they are invoked; to specify (wherever such particularity has seemed likely to be useful) the page of a volume on which authority for the statement in the text is to be found; and, other things being equal, to give preference to a case in which earlier authorities on the topic under consideration are reviewed or brought together. No statement has been taken from a head-note.

To the Article, which has been expanded into the present book, Sir Edward Fry—to whom the book is, with his permission, inscribed—kindly gave the assistance of some valuable criticisms and suggestions. That advantage has not been enjoyed by the additions, which now make their bow.

W. D. R.

1, New Square,
Lincoln's Inn,
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Page 12, line 15—for "*Coast*" read "*Const.*"

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THE

Specific Performance of Contracts.

CHAPTER I.

WHAT SPECIFIC PERFORMANCE IS.

A CONTRACT is specifically performed when each of the parties to it does the very thing or things which he contracted to do, and when, accordingly, each party gets *in specie* what he by the contract bargained for.

This is presumably the object, and should be the consequence and result, of every lawful and not impossible contract; and one would therefore naturally expect to find the enforcement of specific performance occupying, in a civilised system of jurisprudence, the place of the normal legal remedy for breach of contract. And indeed, in Scotland, the breach of a contract for the sale of a specific object, such as a particular piece of land, gives to the party aggrieved the

legal right to sue for specific performance, or, as it is there termed, implement, and he cannot be compelled to resort to the alternative of an action for damages, unless implement is impossible. In other words, specific performance is part of the ordinary jurisdiction of the Scotch Courts (*Stewart* v. *Kennedy*, 1890, 15 App. Cas. at pp. 102, 105).

In England, the existing system of jurisprudence, while not attempting to prescribe or enforce the performance of all contracts according to their actual terms, goes, as will be shown, a long way in that direction. The same or a similar jurisdiction is in force in Ireland, in many British Colonies, and in the United States of America, but not, it is probably safe to affirm, in any other country or State. Specific Performance appears to be a plant of distinctively English growth, and to flourish only where there is a juridical system in which the characteristic ideas and principles of English Courts of Equity have taken root. The prevalent Continental view with regard to the judicial enforcement of contracts may, it is believed, be expressed approximately in the words of the maxim *Nemo potest præcise cogi ad factum.*

CHAPTER II.

THE ORIGIN AND DEVELOPMENT OF THE JURISDICTION.

According to the Common Law of England, which in this respect resembled the Roman Law, the only legal right arising, upon the non-performance of a contract, in favour of the party injured by the breach, was a claim for damages, a form of remedy obviously inadequate, in many cases, for the purposes of justice. It is unconscionable that a person who has entered into a binding contract, which he on his part is perfectly able to perform, should be allowed, as the Common Law in effect allowed him, the right of electing between performance of his part of the contract, and payment of damages for not performing it. And so it is not surprising to find that, when a Court of Conscience (as the Chancellor's Court is called in an early case [Case 123 in the Selden Society's Select Cases in Chancery]) became established in this country, and successive Chancellors presiding over that Court developed and enforced the principles of Equity, one of the matters in

respect of which they assumed and exercised jurisdiction was to decree the specific performance of contracts.

It may be that ecclesiastical Chancellors borrowed the idea from the ecclesiastical Courts Christian, which seem—Sir Edward Fry, in the current edition of his well-known treatise, adduces interesting evidence on the subject—to have claimed a jurisdiction to enforce the specific performance of contracts, in cases where there had been a breach of plighted faith (*fidei læsio*). But, however that may have been, it is tolerably clear that the defect in the English juridical system which the Chancellor's Court sought to cure by decreeing specific performance lay in the rigidity and inadequacy of the Common Law remedy for breach of contract.

"Unquestionably," said Lord Redesdale in *Harnett* v. *Yielding* (1805, 2 Sch. & Lef. at p. 553; 9 R. R. at p. 100), "the original foundation of these decrees was simply this, that damages at Law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed." And similarly Lord Erskine, in *Alley* v. *Deschamps* (1806, 13 Ves. Jun. at p. 227), said: "This Court (of Chan-

cery) assumed the jurisdiction upon this simple principle, that the party had a legal right to the performance of the contract; to which right the Courts of Law, whose jurisdiction did not extend beyond damages, had not the means of giving effect"; adding, "even that was considered by the Courts of Law to be a great usurpation."

It is, indeed, the fact that, as the words just quoted indicate, the Chancery jurisdiction in specific performance was regarded with no little jealousy by the Common Law Courts, and their resistance to it was long continued. The jurisdiction can be traced back as far as to the reign of Richard II. (see the Selden Society's Select Cases in Chancery, p. xxxv.); and yet, so long after that time as the fourteenth year of James I., the judges of the Court of King's Bench stopped, by prohibition, what seems to have been a suit in the Marches Court of Wales to enforce specific performance of a covenant to grant a lease, expressing their opinion that undoubtedly a Court of Equity ought not to give that kind of relief; for, if it did, to what purpose were there actions on the case and of covenant? and Coke, C.J., adding, that to enforce performance would subvert the covenantor's intention, which was that he

should be able to elect between granting the lease and paying damages (*Bromage* v. *Genning*, 1616, Rolle, 354, 368).

Such protests, however, did not avail to prevent the development and firm establishment of the Chancery jurisdiction; and with reference to the last-cited case, a Lord Chancellor (Lord Erskine), nearly two centuries later, in *Halsey* v. *Grant* (1806, 13 Ves. Jun. at p. 76; 9 R. R. 145), made the following trenchant comment: "*Bromage* v. *Genning*, in the fourteenth year of King James I., was the plainest case that can be stated; and the ground, taken against the jurisdiction, the most untenable, preposterous, and unjust."

It was, however, not by any means in all cases of contract that this jurisdiction was exercised. The Power which had brought it into existence naturally made its own conditions with respect to the classes of cases in which, and generally with respect to the circumstances under which, it would grant the special remedy of specific performance.

But, naturally again, a considerable time elapsed before the ever-increasing stream of authority settled down into flowing with a placid and uninterrupted current within well-defined channels. With regard, for instance,

to such questions as whether specific performance of contracts for personal services, or contracts to build or to repair, should or should not be granted, how far a Court of Equity ought to go in the direction of forcing upon a purchaser something different from what he had bargained for, and whether part payment of the purchase-money or payment of an additional rent should or should not be treated as acts of part performance sufficient to take a case out of the Statute of Frauds, very notable fluctuations and divagations of judicial opinion are recorded in the Reports. Indeed, in the seventeenth century John Selden, in a well-known passage (Table Talk, 2nd ed. by Singer, at p. 49), went so far as to say: "Equity in law is the same as the spirit in religion, what everyone pleases to make it. Sometimes they go according to Conscience, sometimes according to Law, sometimes according to the rule of Court. Equity is a roguish thing: for Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot: what an uncertain measure would this be! One Chancellor has a

long foot, another a short foot, a third an indifferent foot: 'Tis the same thing in the Chancellor's conscience."

However, the importance of certainty and uniformity in the decisions of Courts of Equity has long ago become fully recognised in high places. "The doctrines of this Court," said Lord Eldon, in *Gee* v. *Pritchard* (1818, 2 Swans. at p. 414), "ought to be as well settled and made as uniform almost as those of the Common Law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain than the recollection that I had done anything to justify the reproach that the Equity of this Court varies like the Chancellor's foot."

And so, out of a long course of decisions by Lord Chancellors and other Equity judges on the subject of specific performance and matters incidental to it, there was gradually evolved a body of settled principles and rules by which the exercise of the jurisdiction now under consideration is, in the present day, guided and limited almost, if not quite, as strictly as if they had been embodied in a statutory code.

Hence it has come to pass that, though the jurisdiction has often been termed extraordinary, as being outside and independent of the ordinary course of proceedings in Courts of Common Law, its exercise is now a matter of everyday occurrence; and though it is commonly said to be discretionary, the discretion referred to is a judicial discretion, exercisable in accordance with the above-mentioned principles and rules. So that, where a contract binding in Equity is proved, and no principle or rule of the Court prohibits the exercise of the jurisdiction, the remedy of a judgment for specific performance, though strictly not a matter of right, is practically granted as a matter of course (see *Lamare* v. *Dixon*, 1873, L. R. 6 H. L. at p. 423; *Leech* v. *Schweder*, 1874, L. R. 9 Ch. at p. 467; and *Haywood* v. *Cope*, 1858, 25 Beav. at pp. 151—153).

Equity may follow the Law, but she walks arm-in-arm with Precedent; and with regard to specific performance it is particularly true that, "after all, the question to what extent a Court of Equity will go is very largely one of authority as to what has been done before" (*per* Rigby, L.J., in *In re Scott and Alvarez' Contract*, [1895] 2 Ch. at p. 615).

Further, it must not be forgotten that (to use

the words of Sir George Jessel, M.R., in *In re Hallett's Estates*, 1879, 13 Ch. D. at p. 710), "the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. The doctrines are progressive, refined, and improved; and if we want to know what the rules of Equity are, we must look, of course, rather to the more modern than the more ancient cases."

It may here be noticed that the peculiar jurisdiction under consideration is one which the Court of Chancery used to exercise in relation to executory, as distinguished from executed, contracts. "There is a class of suits in this Court," said Lord Selborne, in *Wolverhampton, &c. Rail. Co.* v. *L. & N.-W. Rail. Co.* (1873, L. R. 16 Eq. at p. 439), "known as suits for specific performance of executory agreements, which instruments are not intended between the parties to be the final instruments

regulating their mutual relations under their contracts. We call those executory contracts, as distinct from executed contracts; and we call those contracts 'executed' in which that has been already done which will finally determine and settle the relative positions of the parties, so that nothing else remains to be done for that particular purpose. The common expression 'specific performance,' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed. Of course, if you pass from the technical to the etymological effect of the words, 'specific performance' might signify any direction given by the Court for the doing of anything whatever *in specie;* and I cannot help thinking that in this class of cases a little confusion has sometimes arisen from transferring considerations applicable to suits for specific performance, properly so called, to questions which have arisen as to the propriety of the Court requiring something or other to be done *in specie*."

In many cases arising out of executed con-

tracts, in cases, for instance, of breach of covenant by a lessee, the Court of Chancery, in effect, enforced the covenant *in specie*—enforced, that is to say, the literal performance or observance of it according to its terms—by means of an injunction restraining the lessee from contravening those terms; but such action on the part of the Court was really referable to its general jurisdiction in relation to injunctions, rather than to its special jurisdiction in relation to specific performance properly so called. Similarly, the observance, according to their terms, of stipulation contained in deeds of partnership has often been enforced by the Court by means of an injunction (see *Coast* v. *Harris*, 1825, Turn. & R. 496).

CHAPTER III.

THE EXTENT AND LIMITS OF THE JURISDICTION.

The foundation of the equitable jurisdiction in specific performance being the inadequacy of the Common Law remedy for breach of contract, there is a *primâ facie* case for the exercise of the jurisdiction whenever it appears that one of the parties to a contract binding in Equity has committed a breach of it, and that no remedy at all, or no complete remedy, is available at Common Law to the party aggrieved.

The category of such cases of contract is a wide one, including all binding contracts relating to the sale or lease of land (in the widest sense of that word), or an interest in land, and also a considerable number of contracts relating to personal property, and some relating to personal acts. It will be convenient to deal with contracts relating to land separately from other specifically enforceable contracts, because the former are especially affected by the Statute of Frauds, and by the equitable doctrines or principles concerning part performance and compensation; but before proceeding to consider in

more detail the cases in which specific performance can be enforced, it may be well to clear the ground by mentioning some classes of cases in which the principles and rules of Courts of Equity cause them to refuse to interfere by granting that form of relief.

The Court then—that is to say, the tribunal possessing, in regard to the particular case before it, the equitable jurisdiction in specific performance formerly exercised by the Court of Chancery—will generally refuse that remedy in the following cases, viz.:—

(1) Where the Common Law remedy is adequate; as, for instance, in cases of contracts for sale of Government stock or ordinary articles of merchandise; for there pecuniary damages, calculated on the market price of the stock or goods, are practically as complete a remedy to the purchaser as the actual delivery of them; because, with the money which he gets as damages, he can go into the market and buy a like quantity of stock or goods (*Cuddee* v. *Rutter*, 1720, 1 P. Wms. 570; 2 Wh. & T. Equity Cases, 7th ed. 416). On this principle, too, the Court will not grant specific performance of a contract to let property for a year, or, *à fortiori*, for a single day (*Clayton* v. *Illingworth*, 1853, 10 Ha. at p. 452; *Lavery* v. *Pursell*, 1888, 39

Ch. D. at p. 519; *Glasse* v. *Woolgar*, 1897, 41 Sol. J. 573).

(2) Where the Court would be unable to superintend or enforce effectually the execution of its judgment; as in cases of contracts involving a continuous series of acts, such as contracts for the building of houses, the working of mines, or the construction of railways (*Wilkinson* v. *Clements*, 1872, L. R. 8 Ch. at p. 112; *Wheatley* v. *Westminster Brymbo Co.*, 1869, L. R. 9 Eq. at pp. 551, 552; *Peto* v. *Brighton, &c. Co.*, 1863, 1 Hem. & M. 468; *Kay* v. *Johnson*, 1864, 2 Hem. & M. 118; *Stewart* v. *Kennedy*, 1890, 15 App. Cas. at p. 104).

Note, however, that there is an exception from this rule in cases where a railway company has taken land from a landowner on the terms that it will carry out certain definite works; for in such cases specific performance may be had (see *Ryan* v. *Mutual Tontine, &c. Association*, [1893] 1 Ch. at p. 128; and *Todd* v. *Midl. Gt. W. Rail. Co.*, 1881, 9 L. R. Ir. at p. 10, where it was laid down that a railway company, which has contracted, for valuable consideration, to make a siding at a specified point in its line, will be directed by the Court to perform that contract specifically).

(3) Where the party coming to the Court

does not come with perfect propriety of conduct, or, in seeking the specific performance, is calling upon the other party to do something which he is not lawfully competent to do (*Harnett* v. *Yielding*, 1805, 2 Sch. & Lef. at p. 554; 9 R. R. at p. 101), or which would involve a breach of trust (*Mortlock* v. *Buller*, 1804, 10 Ves. Jun. at pp. 311, 312).

(4) When, from the circumstances, it is doubtful whether the defendant meant to contract to the extent that he is sought to be charged (*Harnett* v. *Yielding*, *ubi supra*).

(5) Where the Court cannot compel specific performance of the contract as a whole (*Ryan* v. *Mutual Tontine, &c. Association*, [1893] 1 Ch. at pp. 123, 125).

Note, however, that where it is apparent, on the face of a contract, that the parties intended that it should be carried into effect piecemeal, a default in the performance of one part of the contract is no defence to an action for specific performance of another part (*Odessa Tramways Co.* v. *Mendel*, 1878, 8 Ch. D. at p. 244; see also *infra*, p. 104).

(6) Where the contract, not being based upon a valuable consideration, is a merely voluntary agreement or *nudum pactum* (*Jefferys* v. *Jefferys*, 1841, Cr. & Ph. at p. 141).

(7) Where the contract is in its nature strictly personal, as, for instance, for the performance of personal services (*Johnson* v. *Shrewsbury and Birmingham Rail. Co.*, 1853, 3 De G. M. & G. Ch. 914, 926; *Bainbridge* v. *Smith*, 1889, 41 Ch. D. at p. 474); and

(8) Generally, where, regard being had to all the circumstances, the enforcement of specific performance would be highly unreasonable (*Stewart* v. *Kennedy*, 1890, 15 App. Cas. at p. 105), or otherwise inequitable, or (as, for instance, in such a case as *Glasse* v. *Woolgar*, cited under head (1) above) impracticable.

Further, although a contract may, on the face of it, appear to be a fit subject for specific enforcement, there may have been some circumstance connected with its inception, or some event, act, or default subsequent to its conclusion, on proof of which the Court will decline to interfere. Instances of such circumstances, events, acts, and defaults will find place later on in this book in Chapter XIV., on GROUNDS OF DEFENCE (*infra*, pp. 97 *et seq.*)

Here, too, it may be mentioned that there is one case in which the Court's jurisdiction in specific performance is expressly restricted by statute.

Sect. 47 of the Fines and Recoveries Act,

1833 (3 & 4 Will. IV. c. 74), enacts that "in cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof, the jurisdiction of Courts of Equity shall be altogether excluded, either on behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts."

But this enactment does not prohibit the Court from specifically enforcing a contract by the tenant in tail of an estate to sell the fee simple, or to execute a disentailing assurance—which contracts would, before the Act, have been enforced by the Court of Chancery (*A.-G.* v. *Day*, 1748—49, 1 Ves. at p. 224),—but only prevents the Court from holding such a contract binding upon the issue in tail and remainderman, as a disposition in Equity under the Act (*Bankes* v. *Small*, 1887, 36 Ch. D. 716).

CHAPTER IV.

CONTRACTS RELATING TO LAND.

CONTRACTS relating to land, or an interest in land, constitute probably by far the most numerous class of cases in which Courts of Equity are asked to grant the relief of a judgment for specific performance; and that form of relief is, indeed, especially appropriate to such cases.

"As to the cases of contracts for purchase of lands, or things that relate to realties," said Lord Hardwicke in *Buxton* v. *Lister*, 1746, 3 Atk. at p. 384, "those are of a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade." Again, "contracts of sale of real estate have always been put in Courts of Equity, and in Courts of Law also, upon a special footing of their own." And "when you are dealing with a contract for the sale of land, a long series of decisions has established that you ought not to try the obligation of the

vendor by the standard applied by the Common Law in cases of ordinary sales of chattels" (*In re Woods and Lewis' Contract*, [1898] 2 Ch. at pp. 214, 216).

The jurisdiction exercised by English Courts of Equity over contracts relating to real property is not confined to cases where the real property is situate in England. *Æquitas agit in personam;* and accordingly, if the party against whom it is desired to enforce a contract respecting land situate abroad is in this country, an action for specific performance may be maintained against him here, and the Court, by bringing the weight of its process to bear upon his person, will compel him to perform his contract, though it cannot by its judgment act directly upon the land itself. Thus, in the leading case of *Penn* v. *Lord Baltimore* (1750, 1 Ves. 444), Lord Hardwicke decreed specific performance of a contract relating to the boundaries of the Provinces of Pennsylvania and Maryland in North America (see, too, *Lord Cranstoun* v. *Johnston*, 1793, 3 Ves. Jun. at p. 182; and *per* Lord Selborne in *Ewing* v. *Orr-Ewing*, 1883, 9 App. Cas. at p. 40).

Further, the contracts of the class now under consideration which are specifically enforceable comprise not only agreements voluntarily

entered into by the contracting parties, but also bargains made under the stress of legislative enactment—as, for example, by virtue of the compulsory powers of purchase conferred by the Lands Clauses Consolidation Act, 1845—between the donees of such powers and those against whom they have become authorised to exercise them. After notice to treat has been given, and the price has been ascertained, a contract or quasi-contract is established, on which an action for specific performance can be maintained either by the vendor or by the purchaser (*Harding* v. *Metropolitan Rail. Co.*, 1872, L. R. 7 Ch. at p. 158; *In re Pigott and The Great Western Rail. Co.*, 1881, 18 Ch. D. at p. 150).

A tenant in possession, holding under a contract for a lease of which specific performance would be enforced by a Court of Equity, is, in contemplation of Equity, entitled to the lease; and he is accordingly regarded and treated, in the High Court, as holding under the same terms, and with and subject to the same rights and liabilities, as if the lease had been actually granted (*Walsh* v. *Lonsdale*, 1882, 21 Ch. D. at pp. 14, 15; *Lowther* v. *Heaver*, 1889, 41 Ch. D. at p. 264).

But there are limits to the application of

this doctrine. It is not applicable in a County Court case, arising out of a contract of which such a Court would not have jurisdiction to grant specific performance (*Foster* v. *Reeves*, [1892] 2 Q. B. 255: see also *Swain* v. *Ayres*, 1888, 21 Q. B. D. at pp. 295—297); nor, again, does it operate to entitle a merely equitable assignee of a lease to exercise a right—*e.g.*, an option to purchase—given by a covenant in the lease to the legal assigns of the lessee (*Friary Holroyd and Healey's Breweries* v. *Singleton*, [1899] 1 Ch. 86).

CHAPTER V.

THE STATUTE OF FRAUDS.

WHETHER the land in question in any particular case is situate in England or abroad, the right of a party to a contract concerning it to sue the other party in this country (see *per* Lindley, L.J., in *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. at p. 207) is, as a rule, very materially affected by the Statute of Frauds (29 Car. II. c. 3). For by the 4th section of that statute it is enacted that "no action shall be brought whereby to charge any person . . . upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

The "action" referred to in the statute was, of course, an action at Common Law. Suits in Equity were not within the words of the 4th section; but they were within the spirit and

meaning of the enactment, and were always so considered, Equity following the Law, and acting in obedience to the statute (see *per* Lord Redesdale in *Hovenden* v. *Annesley*, 1805, 2 Sch. & Lef. at p. 630; 9 R. R. at p. 120; and *per* Lord Westbury in *Knox* v. *Gye*, 1872, L. R. 7 H. L. at p. 674). Accordingly, in the case of a contract of the class now under consideration, the party suing in England for specific performance must, in order to establish his case, prove not only that a contract has been entered into, which, if the above-quoted enactment were out of the way, would be binding and enforceable, but also (unless his case falls within one of the recognised exceptions from the operation of the statute) that the terms of the contract are evidenced in the manner which the statute prescribes.

It is to be observed, however, that the statute does not render void, or illegal, a contract which is not evidenced in accordance with its requirements, but only bars the legal remedy of an action, by which the contract might otherwise have been enforced (*Maddison* v. *Alderson*, 1883, 8 App. Cas. at pp. 474, 488). It relates to the kind of proof required, in this country, to enable a plaintiff suing here to establish his case here, and in that sense regulates procedure here

(*Rochefoucauld* v. *Boustead*, [1897] 1 Ch. at p. 207). And one of the results of this is, that if, in a case where the provisions of the statute have not been complied with, the party sued, being *sui juris*, chooses to waive that defect, specific performance of the contract, if in other respects unobjectionable, may be enforced against him.

Passing now from these preliminary observations to a more detailed consideration of the above-quoted language of this important 4th section of the Statute of Frauds, it will be noticed, in the first place, that its operation extends to every "*contract or sale*"—which words are to be construed according to their literal grammatical meaning (*per* Kay, J., in *McManus* v. *Cooke*, 1887, 35 Ch. D. at p. 687) —"*of lands, tenements, or hereditaments, or any interest in or concerning them.*" Accordingly, not only sales out and out of freeholds, copyholds, or leaseholds, including sales by public auction (*Maddison* v. *Alderson*, 1883, 8 App. Cas. at p. 488), and agreements relating to such sales, but also agreements for leases, and all other contracts touching some interest in land,—as, for instance, a contract to sell debentures charged on land (*Driver* v. *Broad*, [1893] 1 Q. B. 539), to assign a share of partnership assets

comprising land (*Gray* v. *Smith*, 1889, 43 Ch. D. 208), or even to sell the building materials composing a house which at the time of the contract is standing on land (*Lavery* v. *Pursell*, 1888, 39 Ch. D. 508),—fall within the provision of the statute.

In the next place, the statute prescribes that, in cases falling within it, "*the agreement, or some memorandum or note thereof*," must be "*in writing*." It does not, however, prescribe any particular form of document. Therefore any kind of writing, however informal, may do; telegrams, for example, or letters, or even an entry in a man's own diary (see *Coupland* v. *Arrowsmith*, 1868, 18 L. T. N. S. 755; *Kennedy* v. *Lee*, 1817, 3 Mer. at pp. 447, 450; 17 R. R. 110; *In re Hoyle*, [1893] 1 Ch. at pp. 98, 100), and even a statement in an affidavit has been held to be, in point of form, sufficient (*Barkworth* v. *Young*, 1856, 4 Drew. at p. 17). And it is to be remembered that in Acts of Parliament, unless the contrary intention appears, expressions referring to "writing" are to be construed as including references to printing, lithography, and other modes of representing or reproducing words in a visible form (Interpretation Act, 1889, s. 20).

Further, the statute does not prescribe, and

the Court accordingly does not require, that the whole of the contract be expressed in a single document. It is allowable for a plaintiff to furnish the requisite written evidence of the contract which he is seeking to establish by reading together two or more paper writings, provided that they are such as to constitute in substance one document,—as, for instance, a letter and the envelope in which it was posted (*Pearce* v. *Gardner*, [1897] 1 Q. B. 688),—or that the writing containing the signature of the defendant or his agent refers to the other writing or writings so as to connect them all with one another, parol evidence being admissible to identify the actual writing or writings referred to (see on this subject, *Ridgway* v. *Wharton*, 1856-57, 6 Cl. H. L. 238; *Clinan* v. *Cooke*, 1802, 1 Sch. & Lef. at p. 33; 9 R. R. at p. 7; *Shardlow* v. *Cotterell*, 1881, 20 Ch. D. 90; *Oliver* v. *Hunting*, 1890, 44 Ch. D. at p. 207).

The commonest instance of this kind of thing occurs in the case of a contract constituted by correspondence. It must, however, be borne in mind that, in such a case, the correspondence which has passed between the parties, or their agents, is to be read, and will be considered by the Court, as a whole. For two letters picked out of a correspondence, and read by themselves,

might appear to constitute a complete contract; whereas, on perusal of the rest of the letters, it might be obvious that neither of the parties had ever intended to conclude a contract with the other party, and that in truth the matter had never passed beyond the stage of negotiation (*Hussey* v. *Horne-Payne*, 1879, 4 App. Cas. 311). But if once a complete contract has been constituted by correspondence, it will not be affected by subsequent letters containing negotiations on new points raised for the first time after the conclusion of the contract (*Bellamy* v. *Debenham*, 1890, 45 Ch. D. 481).

It often happens, though, that letters or other informal documents relied on by a plaintiff as evidencing a contract contain expressions pointing to an intention or desire on the writer's part to have the agreed terms embodied in a formal instrument of agreement. In such cases, it is a question of construction whether a complete enforceable contract has or has not been concluded.

On the one hand, if, for instance, an intending purchaser of land writes a letter agreeing to buy it, subject, expressly, to a formal contract being prepared and signed, the letter means what it says; and unless and until a formal contract is signed, there is no concluded con-

tract (*Winn* v. *Bull*, 1877, 7 Ch. D. at p. 32; *Lloyd* v. *Nowell*, [1895] 2 Ch. 744). And on this ground the Court, in an Irish case, refused to interfere where, an intending purchaser having made a written offer, the vendor replied by telegram—"Accept your offer of 1,200*l.*, subject to letter and agreement to be sent to your solicitor" (*Brien* v. *Swainson*, 1877, 1 L. R. Ir. 135).

If, on the other hand, there is a simple acceptance in writing of an offer to sell or purchase, accompanied by words expressive of the acceptor's desire to have the terms of the arrangement embodied in some more formal document, such words will not prevent the Court from enforcing the contract constituted by the offer and acceptance (*Rossiter* v. *Miller*, 1878, 3 App. Cas. 1137-9; *Bonnewell* v. *Jenkins*, 1878, 8 Ch. D. 70; *Filby* v. *Hounsell*, [1896] 2 Ch. 737; *North* v. *Percival*, [1898] 2 Ch. 128).

Next, as to the contents of the written agreement, memorandum, or note. The statute gives no explicit direction as to what terms of a contract falling within its scope must be expressed in writing; but the matter has been abundantly elucidated by judicial decisions.

The general principle is that the essential

terms of the contract must be expressed in writing. What, then, are the essential terms? Contracts falling within the scope of the statute vary so much in their details, that it is not practicable to give an exhaustive and universally applicable answer to this question; but there are certain matters which may be indicated as being necessary to be expressed.

Every contract in writing for the sale of land, or an interest in land, must contain words which show or provide means of ascertaining, (i.) who the contracting parties are, (ii.) what the subject-matter of the contract is, and (iii.) what the price or other consideration to be paid or given by the purchaser is.

The parties need not be actually named in the writing; any description sufficient to identify the person referred to will do, "the proprietor," for instance (*Sale* v. *Lambert*, 1874, L. R. 18 Eq. 1), though not "the vendor" (*Potter* v. *Duffield*, *ibid.* 4); and a memorandum may sufficiently indicate the contracting parties, although the persons appearing on the face of it to be the vendor and the purchaser are, in fact, agents for undisclosed principals, who the principals are being proveable by parol evidence, whether the fact of agency can be gathered from the written document or not

(*Filby* v. *Hounsell*, [1896] 2 Ch. at p. 740). *Id certum est quod certum reddi potest* (see *per* Lord Cairns in *Rossiter* v. *Miller*, 1878, 3 App. Cas. at p. 1141); and the same principle is applicable to the description of the subject-matter of contract (*e.g.*, *Plant* v. *Bourne*, [1897] 2 Ch. 281, where "twenty-four acres of land, freehold, at T., in the parish of D.," was held by the Court of Appeal to be a sufficient description; and *North* v. *Percival*, [1898] 2 Ch. 128), and also to the price or other consideration, as where the contract is to sell at a fair valuation, or at such a price as A. (a third person) shall fix; but, in the last-mentioned case, the contract is not enforceable unless or until A. has fixed the price (*Milnes* v. *Gery*, 1807, 14 Ves. Jun. 400, 407; 9 R. R. 307). Parol evidence is admissible to identify the subject-matter of contract with the description of it in the writing (*e.g.*, *McMurray* v. *Spicer*, 1868, L. R. 5 Eq. at pp. 536, 537).

It is not absolutely necessary, in the case of a sale of land, that the estate or interest to be sold should be specified in writing; for a contract simply to sell land is implied by law to be a contract to sell the whole of the vendor's interest in it, and that interest will be similarly implied to be an estate in fee simple (*Bower* v.

Cooper, 1842, 2 Hare, 408; *Hughes* v. *Parker*, 1841, 8 Mee. & W. 244). But, in the case of a contract for a lease, the writing must show not only (in the manner already indicated) the parties, the subject-matter, and the rent, but also the length of the term, and the date of its commencement (*Marshall* v. *Berridge*, 1881, 19 Ch. D. 233), which date, however, may be collected from the document read as a whole (*In re Lander and Bagley's Contract*, [1892] 3 Ch. at p. 48), or may be ascertained from circumstances referred to in the document (*Phelan* v. *Tedcastle*, 1885, 15 L. R. Ir. at p. 175).

With respect to the consideration, it has been distinctly laid down in the Court of Appeal in a recent case (*In re Kharaskhoma Exploring and Prospecting Syndicate*, [1897] 2 Ch. at pp. 464, 467; see also *ibid.* at top of p. 463), that "a contract in writing must express as part of the contract the consideration," and that, "if you have a document in writing which does not show in writing what is the consideration, it is not a contract at all in writing,—in other words, a document which only discloses part of a contract is not a contract in writing." (See, too, *South Hetton Coal Co.* v. *Haswell, &c. Co.*, [1898] 1 Ch. at p. 469.)

If, however, in a case to which the Statute of Frauds applies, the consideration has not been expressed in the writing, but there has been such part performance as to take the case out of the statute, the consideration may be proved by parol evidence in an action for specific performance of the contract (*Kelly* v. *Walsh*, 1878, 1 L. R. Ir. at p. 283).

The statute further prescribes that the writing must be "*signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized*," *i.e.*, his agent for the purpose of signing.

"*Signed*," not "subscribed"; therefore, whether the name occurs in the body of the writing, or at the beginning, or at the end, it will satisfy the statute, provided it is intended to be a signature governing the whole of the writing (*Evans* v. *Hoare*, [1892] 1 Q. B. at p. 597; *Caton* v. *Caton*, 1867, L. R. 2 H. L. at p. 143): for the statute does not make any signed instrument a binding contract by reason of the signature, contrary to the intention of the signatory (*Hussey* v. *Horne-Payne*, 1879, 4 App. Cas. at p. 323; and see *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25).

"*By the party to be charged*," not "by all the parties"; accordingly, a party who has not

signed (as, for instance, in the case of an acceptance by parol of a written offer) may enforce a contract against a party who has signed (*Seton* v. *Slade*, 1802, 7 Ves. Jun. at p. 275; 6 R. R. 124; *Reuss* v. *Picksley*, 1866, L. R. 1 Ex. 342).

"*Or some other person*," &c. Where a plaintiff founds upon signature by an agent for the defendant, he must prove, unless it is admitted, that the alleged agent had authority not merely to negotiate, but to sign, on his principal's behalf, the contract sued on (*Smith* v. *Webster*, 1876, 3 Ch. D. 49; *Godwin* v. *Brind*, 1868, L. R. 5 C. P. 299, n.). But the agent's appointment need not be in writing (*Heard* v. *Pilley*, 1869, L. R. 4 Ch. 548), and it matters not whether his authority be given to him previously to the contract, or subsequently by the principal's ratification of his act (*Ridgway* v. *Wharton*, 1857, 6 Cl. H. L. at pp. 296, 297; and as to the requisites of a binding adoption, or ratification, of acts done without previous authority, see *Marsh* v. *Joseph*, [1897] 1 Ch. 213).

At a sale by public auction, the auctioneer is the agent not only of the vendor, but also of the purchaser, the highest bidder; and he is entitled to sign, at the time and as part of the

transaction (but not afterwards), in the names and on behalf of both parties, a memorandum sufficient to satisfy the statute (*Sims* v. *Landray*, [1894] 2 Ch. at p. 320; *Bell* v. *Balls*, [1897] 1 Ch. at pp. 669, 671). But *delegatus non potest delegare;* and, accordingly, the auctioneer's clerk has no authority to sign as the purchaser's agent, unless the purchaser has by word, sign, or otherwise specially authorised him so to do (*Bell* v. *Balls*, and *Sims* v. *Landray*, *ubi supra*).

CHAPTER VI.

EXCEPTIONS FROM THE STATUTE OF FRAUDS.

The provisions of the 4th section of the Statute of Frauds are binding upon Courts of Equity (see *per* Lord Erskine in *Buckmaster* v. *Harrop*, 1807, 13 Ves. Jun. at p. 472; 6 R. R. 132; and *supra*, p. 23); but those Courts have, nevertheless, taken upon themselves to hold, and to enforce their view, that, under certain circumstances, contracts may be treated as excepted from the operation, or (to use the common phrase) "taken out," of the statute—a striking instance of legislation by judicial decision. These exceptions are cases of (I.) fraud, (II.) part performance, (III.) admission by the defendant, and (IV.) sale by the Court; and each of them calls for some explanation.

(I.) *Fraud.*—The principle of the Court is, that the Statute of Frauds was not made to cover fraud; and it does not prevent the proof of a fraud (*Lincoln* v. *Wright*, 1859, 4 De G. & J. Ch. at p. 22; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. at p. 206). "Cases in this Court,"

said Lord Eldon, in *Mestaer* v. *Gillespie* (1806, 11 Ves. Jun. at p. 628; 8 R. R. 266), "are perfectly familiar, deciding that a fraudulent use shall not be made of that statute (the Statute of Frauds), where this Court has interfered against a party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud; even though the statute has declared that, in case those circumstances do not exist, the instrument shall be absolutely void": in connection with which statement it is to be remembered that (as has been mentioned *supra*, p. 24) the Statute of Frauds does not avoid a contract falling within its scope, but only affects the right of suing upon it.

Accordingly, if, for instance, the lack of written evidence of a contract is owing to the fraud of one of the parties, as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former, in this or such like cases of fraud Equity would relieve, even against the words of the statute (*Viscountess Montacute* v. *Maxwell*, 1720, 1 P. Wms. at p. 616). For to allow any other construction of the statute would be to make it a guard and protection to fraud, instead of a security against it, as was the

design and intention of it (*per* Lord Hardwicke in *Walker* v. *Walker*, 1740, 2 Atk. at p. 100).

(II.) *Part Performance.*—Where a parol contract has been, in the view of the Court, partly performed, specific performance may be enforced, notwithstanding the absence of the writing prescribed by the statute.

This is, in truth, an instance—though such an important one as to require separate discussion—of the application of the principle enunciated under the preceding head (*supra*, p. 36). For the ground upon which Courts of Equity interfere, in cases of this sort, is that otherwise one party to a contract would be able to practise a fraud upon the other (Story's Equity Jurisprudence, s. 759). It would be against conscience to allow a party, who had entered and expended his money upon land on the faith of a verbal contract, to be treated as a trespasser, and the other party to enjoy the advantage of the money so expended (*Bond* v. *Hopkins*, 1802, 1 Sch. & Lef. at p. 433). In such a case, the party seeking to ignore the contract is really "charged," not (within the meaning of the statute) upon the contract itself, but upon the equities resulting from the acts done in execution of the contract. In other words, when the statute says, in effect, that no action is to be brought to charge any person

upon a contract concerning land unless it is evidenced in the manner prescribed by the enactment, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract (see *per* Lord Selborne in *Maddison* v. *Alderson*, 1883, 8 App. Cas. 467, at pp. 475, 476).

This doctrine concerning part performance appears to be almost, if not quite, coeval with the statute (see, for instance, *Hollis* v. *Edwards*, 1683, 1 Vern. 159, and *Butcher* v. *Stapely*, 1685, 1 Vern. 363); and it has been illustrated by a great number and variety of reported cases. From these it has to be gathered what acts will, and what will not, be regarded nowadays by the Court as sufficient acts of part performance to take a case out of the statute, or, in other words, as constituting sufficient grounds for the admission of parol evidence of the terms of a contract falling *primâ facie* within the statute's scope. It is not at all likely that the limits of the doctrine will in the future be enlarged (compare *Maddison* v. *Alderson*, *ubi supra*, at pp. 489, 491, and *Lindsay* v. *Lynch*, 1804, 2 Sch. & Lef. at p. 5; 9 R. R. at p. 57).

In the first place, then, the acts relied upon

as part performance must be unequivocally, and in their own nature, referable to some such contract as that alleged (*Maddison* v. *Alderson*, *ubi supra*, at p. 479). Further, "nothing is considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed" (*Clinan* v. *Cooke*, 1802, 1 Sch. & Lef. at p. 41; 9 R. R. at p. 9). And again, "it is not enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract" (*Maddison* v. *Alderson*, *ubi supra*, at p. 478).

Of the acts which have been held to be sufficient to exclude the statute, the following are examples, viz.: possession of land taken, or even in some cases continued, by one party, after the contract, with the knowledge and acquiescence of the other party (*Morphett* v. *Jones*, 1818, 1 Swans. at p. 181; 18 R. R. 48; *Hodson* v. *Heuland*, [1896] 2 Ch. 428, 434); expenditure of money in alterations and repairs of buildings by, or by the authority of, the tenant in possession, with the landlord's approval (*Williams* v. *Evans*, 1875, L. R. 19 Eq.

547); payment of rent at an increased rate (*Nunn* v. *Fabian*, 1865, L. R. 1 Ch. 55; followed in *Conner* v. *Fitzgerald*, 1883, 11 L. R. Ir. esp. pp. 114, 115, and in *Miller and Aldworth Limited* v. *Sharp*, 1899, 47 W. R. 266), though *query* the difference in principle between such payment and payment of purchase-money; and a wife's return to live with her husband after a separation (*Webster* v. *Webster*, 1853, 4 De G. M. & G. Ch. 437).

On the other hand, acts of the following kind will not be treated as part performance, viz.: acts merely introductory or ancillary to a contract (see examples collected in Story's Equity Jurisprudence, s. 762, and in *Maddison* v. *Alderson*, *ubi supra*, at p. 480); payment of part or even the whole of the purchase-money, for the payment of money is an equivocal act, not (in itself) indicative of a contract concerning land (*Maddison* v. *Alderson*, *ubi supra*, at p. 479); and marriage, for the statute expressly requires "agreements made upon consideration of marriage" to be evidenced by some writing (*Taylor* v. *Beech*, 1749, 1 Ves. 298; *Warden* v. *Jones*, 1857, 2 De G. & J. Ch. at p. 84; *Caton* v. *Caton*, 1866, L. R. 1 Ch. at p. 147).

Further, it must be borne in mind that the only defect which part performance cures is the

formal one of want of written evidence of a contract.

Part performance is not a panacea. It presupposes a complete contract (*Lady E. Thynne* v. *Earl of Glengall*, 1848, 2 Cl. H. L. at p. 158); and it is of no avail to prove an act of part performance, unless the parol evidence thus let in proves plainly and distinctly (*Price* v. *Salusbury*, 1863, 32 Beav. at p. 459), or the defendant admits, a contract complete in its terms, and such in all respects as to be, according to the principles and rules of the Court, specifically enforceable. So, where there has been a parol contract and part performance, but the case is one in which specific performance could not be directed, the plaintiff is not entitled, by virtue of the part performance, to obtain relief in damages (*Lavery* v. *Pursell*, 1888, 39 Ch. D. at pp. 518, 519).

And it may here be noticed that although, on the one hand, where there has been a contract in writing and no part performance, the law presumes that the writing expresses the whole of the contract, and therefore will not permit it to be varied by parol evidence (see, however, *infra*, p. 129), still, on the other hand, where there has been part performance, parol evidence is admissible in a Court of Equity to add to, or otherwise modify, the terms even of a written

contract; for what the real contract ultimately was must depend on the combined effect of what was agreed upon in writing and what was agreed upon verbally (see *per* Turner, L.J., in *Price* v. *Salusbury*, 1863, 32 L. J. Ch. at p. 452; *Sutherland* v. *Briggs*, 1841, 1 Hare, at p. 35; and *Kelly* v. *Walsh*, 1878, 1 L. R. Ir. at p. 283, more fully referred to *supra*, p. 33). But the party seeking to enforce the contract as varied must, in order to succeed, prove that the other party understood and assented to the variation (*Earl of Darnley* v. *Proprietors, &c., of London, Chatham & Dover Railway*, 1867, L. R. 2 H. L. at p. 60).

The applicability of the doctrine of part performance has not been extended by the Judicature Act, 1873 (36 & 37 Vict. c. 66). It applies, in the High Court, only to cases to which it would have applied in the Court of Chancery (*Britain* v. *Rossiter*, 1879, 11 Q. B. D. 123). But with respect to the limits observed by the Court of Chancery in applying the doctrine, there has, since the passing of the last-mentioned Act, been some diversity of judicial opinion. In *Britain* v. *Rossiter* (*ubi supra*) in the Court of Appeal, all the judges (Lord Esher, M.R., and Cotton and Thesiger, L.JJ.), substantially concurred in the opinion

that the doctrine was confined to cases of contracts relating to land, or to some interest in land. Subsequently, in *Maddison* v. *Alderson* (1883, 8 App. Cas. at p. 474), Lord Selborne intimated a doubt as to the correctness of that opinion. And still more recently, in *McManus* v. *Cooke* (1887, 35 Ch. D. 681, 697), Kay, J., expressed the view that the doctrine applied to all cases in which a Court of Equity would entertain a suit for specific performance, if the contract alleged had been in writing, and in particular that it applied to a parol agreement for an easement, though no interest in land was intended to be acquired. This much, at any rate, may safely be said, that the great majority of reported cases in which the doctrine has been applied, and also of the cases in which it is nowadays invoked, have been and are cases of contracts concerning land, or some interest in land (see *per* Lord Selborne in *Maddison* v. *Alderson*, *ubi supra*, at p. 474).

(III.) *Admission by Defendant.*—The object of the Statute of Frauds was to prevent frauds and perjuries, the Legislature evidently thinking, in framing the 4th section, that there were some contracts of so important a nature that it was not right to leave them to depend on the slippery testimony of men's memories (*Lavery* v. *Pursell*,

1888, 39 Ch. D. at p. 513). But where a plaintiff pleads a contract to the enforcement of which the want of writing is the only objection, and the defendant by his pleading does not raise the bar of the statute, and admits, either expressly or impliedly (Ord. XIX. rr. 15, 17, 20), the contract alleged by the plaintiff, the case is taken entirely out of the mischief which the statute had in view: there is no room for fraud or perjury; and the Court will accordingly direct specific performance (*Lacon* v. *Martins*, 1743, 3 Atk. at p. 3; *A.-G.* v. *Day*, 1748–49, 1 Ves. at p. 221).

(**IV.**) ***Sale by the Court.***—Where property is sold under the direction of the Court, the judicial nature of the proceedings, in which the fact of the sale, the particulars of the property sold, the price, and the name of the purchaser are formally certified by the Master, takes the case out of the mischief to prevent which the statute was enacted; and the Court regards such cases as excepted from the operation of the statute (*A.-G.* v. *Day*, 1748–49, 1 Ves. at p. 221; *Blagden* v. *Bradbear*, 1806, 12 Ves. Jun. at p. 472).

CHAPTER VII.

CONTRACTS RELATING TO PERSONAL PROPERTY OR ACTS.

THE number and variety of imaginable contracts relating to personal property, or personal acts, are almost infinite. All that can be attempted here will be to advert briefly to the principal classes of contracts falling within this category (as well as, as regards some few of them, within the category of contracts relating to land), with respect to which the granting or withholding of relief by way of specific performance has been judicially considered.

Annuity.—Contracts to purchase or to sell life annuities may be specifically enforced (*Withy* v. *Cottle*, 1823, Turn. & R. 78; *Pritchard* v. *Ovey*, 1820, 1 Jac. & W. 396).

Arbitration and Award.—An action will not lie for specific performance of a contract to refer to arbitration (*Street* v. *Rigby*, 1802, 6 Ves. Jun. at p. 318), but will lie for specific performance of an award (*Wood* v. *Griffith*,

1818, 1 Swans. at p. 54; see, too, *Nickels* v. *Hancock*, 1855, 7 De G. M. & G. 300).

Business.—See ***Goodwill, infra***, p. 48.

Charter-Party.—The Court cannot affirmatively enforce the contract contained in a charter-party, but can restrain, by injunction, the employment of a ship in a manner inconsistent with the rights given by that contract (*De Mattos* v. *Gibson*, 1859, 4 De G. & J. Ch. at p. 299; *Le Blanche* v. *Granger*, 1866, 35 Beav. 187).

Chattels.—It is only in cases where chattels are unique, or (not merely convenient for the purposes of, but) of peculiar value to the plaintiff, that the Court will specifically enforce contracts for the sale and delivery of them (compare *Falcke* v. *Gray*, 1859, 4 Drew. 651, and *Fothergill* v. *Rowland*, 1873, L. R. 17 Eq. at pp. 139, 140; and distinguish *Dowling* v. *Betjemann*, 1862, 2 John. & H. 544).

These cases of specific performance may be compared with those in which, independently of any question of contract, the Court of Chancery exercised jurisdiction to enforce the delivery up *in specie* of heirlooms, such as the horn in *Pusey* v. *Pusey* (1684, 1 Vern. 273), or curiosities, such as the old silver altar-piece in *Duke of Somerset* v. *Cookson* (1735, 3 P. Wms.

389), and with the remedy of execution for the delivery of a chattel, which is now (Ord. XLVIII. r. 2) obtainable in the High Court, in a Common Law action of detinue.

Compromise.—An agreement for a compromise may be specifically enforced (*Attwood* v. ——, 1826, 1 Russ. 353), and, if made in an action, by means of a summons taken out in that action (*Eden* v. *Naish*, 1878, L. R. 7 Ch. 781).

Debts.—An action will lie for specific performance of a contract to purchase a debt (*Wright* v. *Bell*, 1818, 5 Price, Ex. 325).

Expectancies.—Contracts dealing with expectancies have, in numerous reported cases, been upheld by Courts of Equity, and directed to be specifically performed (see *Lyde* v. *Mynn*, 1833, 1 Myl. & K. 683, and cases there referred to).

Family Arrangements.—These are regarded with favour by the Court, and, whatever be the nature of the property to which they relate, they will, if fair and reasonable, be specifically enforced (*Stapilton* v. *Stapilton*, 1739, 1 Atk. 2; *Westby* v. *Westby*, 1842, 2 Dr. & War. at p. 525; *Williams* v. *Williams*, 1867, L. R. 2 Ch. 294).

Goodwill.—A contract for sale of business premises with the goodwill annexed to them is

capable of being specifically enforced (*Darbey* v. *Whitaker*, 1857, 4 Drew. at p. 140), but not a contract to sell a goodwill alone (*ibid.* at p. 139; *Baxter* v. *Conolly*, 1820, 1 Jac. & W. 576), nor, it is conceived, a contract to sell a business, or a medical practice, apart from the business premises or other tangible property (*Bozon* v. *Farlow*, 1816, 1 Mer. 459; *May* v. *Thomson*, 1882, 20 Ch. D. 706).

Indemnity.—A contract simply to indemnify is not specifically enforceable; but if the indemnifying party also agrees to do some act, the doing of which would operate as an indemnity, performance of the act may be compelled (*L. & S. W. Rail. Co.* v. *Humphrey*, 1858, 6 W. R. at p. 785).

Leaseholds.—Leasehold property is regarded by English Law as personalty; but such property is an interest in land, and accordingly contracts relating to leaseholds fall within the category of contracts relating to land, which have already been discussed. See Chapters III. to VI., *supra*.

Loans.—Specific performance of a contract to lend and borrow money is not granted at the suit either of the proposed lender or of the proposed borrower, whether the loan is to be on security or without security (*South African*

Territories v. *Wallington*, [1897] 1 Q. B. at p. 696; [1898] App. Cas. 309); but where money has been actually advanced, the Court will enforce specific performance of a contract to execute a mortgage for securing the repayment of the advance (*Hermann* v. *Hodges*, 1873, L. R. 16 Eq. 18).

Marriage Articles.—Performance of a contract on marriage for the settlement of personal, no less than of real, property may be enforced by the Court (*Jeston* v. *Key*, 1871, L. R. 6 Ch. 610; and see *Harvey* v. *Ashley*, 1748, 3 Atk. at p. 611).

Parliament.—Cases may, perhaps, arise in which a contract not to apply for a private Act of Parliament will be enforced by means of an injunction (*Steele* v. *North Metropolitan Rail. Co.*, 1867, L. R. 2 Ch. at p. 238, n.); but, as a rule, contracts not to apply to Parliament will not be enforced by the Court (*S. C.;* and *Lancaster, &c. Rail. Co.* v. *North-Western Rail. Co.*, 1856, 2 Kay & J. 293).

Partnership.—As a general rule, the Court will not adjudge specific performance of a contract to form and carry on a partnership. There may be exceptions, but very limited exceptions, from that rule, as, for instance, where, after part performance of such a contract, the Court has decreed the execution of a

proper deed of partnership (*Scott* v. *Rayment*, 1868, L. R. 7 Eq. at p. 115; *England* v. *Curling*, 1844, 8 Beav. 129).

Patents.—A contract for the sale of a patent was specifically enforced in *Cogent* v. *Gibson* (1864, 33 Beav. 557; see, too, *New Ixion Tyre, &c. Co.* v. *Spilsbury*, [1898] 2 Ch. at p. 142; and *Preston* v. *Luck*, 1884, 27 Ch. D. 497, 500); and similar relief may be obtained on a contract by the vendor of a patent to assign to the purchaser patent rights which the former may acquire in the future (*Printing, &c. Co.* v. *Sampson*, 1875, L. R. 19 Eq. 462).

Personal Acts.—A party to a contract may, in certain cases, be ordered to perform a stipulation for the execution by him of a bond or other deed (*e.g. Avery* v. *Langford*, 1854, Kay, 663; *Granville* v. *Betts*, 1848, 18 L. J. Ch. 32; cp. the old cases referred to in *Stewart* v. *Kennedy*, 1890, 15 App. Cas. at p. 104); but such contracts as a contract by an actor to act at a particular theatre (*Kemble* v. *Kean*, 1829, 6 Sim. 333), or a contract to supply publishers with drawings of maps for engraving and publication, cannot be specifically enforced (*Baldwin* v. *Society for Diffusing Useful Knowledge*, 1838, 9 Sim. 393).

Personal Services.—As has been already noticed

(*supra*, p. 17), the Court does not grant specific performance of contracts for personal service, such, for instance, as contracts of hiring and service (*Rigby* v. *Connol*, 1880, 14 Ch. D. at p. 487), apprenticeship (*De Francesco* v. *Barnum*, 1890, 45 Ch. D. at p. 437), or agency (*Chinnock* v. *Sainsbury*, 1860, 30 L. J. Ch. 409).

Reversions.—Contracts for the sale and purchase of reversionary interests, if made—to use the words of the Sales of Reversions Act, 1867 (31 Vict. c. 4, s. 1)—"*bonâ fide* and without fraud or unfair dealing," are, it is conceived, specifically enforceable, the former rule, that a purchaser of a reversion must prove that he gave a full price (*Hincksman* v. *Smith*, 1827, 3 Russ. 433), having been virtually abrogated by the last-mentioned Act. Still, neither that Act, nor the abolition of the usury laws, has taken away the old jurisdiction of Courts of Equity to protect expectant heirs and reversioners, and other persons who, owing to ignorance, poverty, or other circumstances, are peculiarly exposed to extortion and oppression, and to relieve them against catching bargains (see *O'Rorke* v. *Bolingbroke*, 1877, 2 App. Cas. at p. 833; *Fry* v. *Lane*, 1888, 11 Ch. D. at p. 322; and the judgments in *Rae* v. *Joyce*, 1892, 29 L. R. Ir. 500. See, also, under the

head *Delay, infra*, p. 101, and *Drysdale* v. *Mace*, 1854, 5 De G. M. & G. Ch. 103).

Separation.—A valid contract for the present separation of husband and wife may be enforced specifically by directing the execution of a proper deed for that purpose (*Wilson* v. *Wilson*, 1848, 1 Cl. H. L. 538); but a contract providing for their prospective separation is unenforceable (*Westmeath* v. *Salisbury*, 1831, 5 Bli. N. S. at p. 367).

Husband and wife, when engaged in matrimonial litigation, (as to this limitation of the proposition, see and compare *Cahill* v. *Cahill*, 1883, 8 App. Cas. at pp. 429—432, and *McGregor* v. *McGregor*, 1888, 21 Q. B. D. at p. 430,) can validly contract with one another for a present separation (*Besant* v. *Wood*, 1879, 12 Ch. D. 605), provided there is some sufficient consideration for the contract (*Wilson* v. *Wilson*, *ubi supra*, at p. 574; *Gibbs* v. *Harding*, 1870, L. R. 3 Ch. at p. 339). Formerly such a contract was unenforceable, if it contained a provision for the father giving up the custody of his infant children to his wife (*Hope* v. *Hope*, 1857, 8 De G. M. & G. Ch. at p. 745); but the effect of the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12, s. 2), has been to remove this objection to the specific performance of a

contract for separation (*Hart* v. *Hart*, 1881, 18 Ch. D. at pp. 681, 682). It was held, in the last-mentioned case, that the Chancery Division could enforce specific performance of a contract for a separation deed, and for compromise of a petition in the Divorce Division, without infringing the provision of the Judicature Act, 1873, (s. 24 (5)), which forbids interference by one branch of the High Court with proceedings pending in another branch; and also that, the contract being on the face of it complete, the circumstance that it contained a provision for the reference to named arbitrators of any difference which might arise in working out its terms, did not oust the jurisdiction of the Court to direct the separation deed to be settled by the Judge in Chambers.

Shares and Stock.—Although, as has already been noticed (*supra*, p. 14), the Court will not specifically enforce a contract to sell Government stock (*Nutbrown* v. *Thornton*, 1804, 18 Ves. Jun. at p. 161), it will so enforce, at the instance either of the vendor or of the purchaser, contracts, even by parol, for the sale of shares in companies (*Duncuft* v. *Albrecht*, 1841, 12 Sim. 189), provided, of course, that performance is not impossible (*Ferguson* v. *Wilson*, 1866, L. R. 2 Ch. 77), and that the right to it has not been

lost or abrogated by delay or otherwise, *e.g.* by a rescission of the contract (*Nicol's Case*, 1885, 29 Ch. D. at pp. 428, 445). Such enforcement may be had though the vendor be only equitably entitled to the shares (*Paine* v. *Hutchinson*, 1868, L. R. 3 Ch. at p. 390), or though, the contract being one governed by Stock Exchange rules, the purchaser sued be not the original purchaser, but the nominee of the purchasing jobber or broker (*Evans* v. *Wood*, 1867, L. R. 5 Eq. 9).

Contracts for sale and purchase of shares are generally so made as to be subject to the rules and usages of the London Stock Exchange. A useful statement in explanation of some of those rules and usages is to be found in *Nickalls* v. *Merry* (1875, L. R. 7 H. L. at pp. 539—541).

As to whether, and in what cases, if any, performance of a contract between vendor and purchaser of shares in a company can be enforced by means of an application, under sect. 35 of the Companies Act, 1862, for rectification of the company's register of shareholders, see *Ward and Henry's Case*, 1867, L. R. 2 Ch. 431; *Ex parte Sargent*, 1873, L. R. 17 Eq. at p. 276; *Ex parte Shaw*, 1877, 2 Q. B. D. 463, 477—480.

Ships.—By sect. 57 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), it is enacted that, without prejudice to the provisions of that

Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract may be enforced by or against owners or mortgagees of ships, in respect of their interest therein, in the same manner as in respect of any other personal property. Accordingly, the Court has, it is conceived, jurisdiction to adjudge specific performance of contracts for sale of British ships (*Batthyany* v. *Bouch*, 1881, 50 L. J. Q. B. 421), as well as, in certain cases (*e.g. Hart* v. *Herwig*, 1873, L. R. 8 Ch. at p. 866), of non-British ships. In *Claringbould* v. *Curtis* (1852, 21 L. J. Ch. 541), specific performance of a contract to sell a barge was decreed.

Trade.—See ***Goodwill,*** *supra*, p. 48.

CHAPTER VIII.

COMPENSATION.

The principle of compensation in connection with specific performance is a creation of English Courts of Equity, and a corollary to the propositions underlying their peculiar jurisdiction as to enforcing contracts specifically. It is unknown to the law of Scotland (*Stewart* v. *Kennedy*, 1890, 15 App. Cas. at p. 102). It resembles the equitable doctrine of part performance in this, that very nearly all the reported cases in which it has been applied were cases of contracts relating to land, or some interest in land. Its assistance may be invoked either by the vendor or by the purchaser; but it goes further in favour of the latter than of the former. For, briefly stated, it amounts to this, viz.: (i.) where the vendor is the party seeking to enforce the contract, and he can perform his part of it substantially, though not according to the strict letter (so that he would be unable to maintain an action at Common Law upon it), then, generally, the contract, if in other respects

unobjectionable, will be specifically enforced by the Court, the vendor compensating the purchaser for any deficiency in value of what the vendor can actually convey as compared with what he contracted to sell; but (ii.) where the purchaser is the party seeking to enforce the contract, he is, generally, entitled to have a conveyance from the vendor of all that he can convey, even though that be substantially different from the expressed subject-matter of the contract (so that the vendor could not enforce performance), and, in addition, to be allowed compensation, commonly by way of abatement from the purchase-money, for the difference.

The two aspects of the principle, in its application to the cases of (i.) a vendor plaintiff, and (ii.) a purchaser plaintiff, have been clearly pointed out by Lord Erskine and Lord Eldon.

As to (i.), Lord Erskine said, in *Halsey* v. *Grant* (1806, 13 Ves. Jun. at pp. 77, 79): "Equity does not permit the forms of Law to be made instruments of injustice; and will interfere against parties attempting to avail themselves of the rigid rule of Law for unconscientious purposes. Where, therefore, advantage is taken of a circumstance that does not admit of a strict performance of the contract,

if the failure is not substantial, Equity will interfere. If, for instance, the contract is for a term of ninety-nine years in a farm, and it appears that the vendor has only ninety-eight or ninety-seven years, he must be non-suited in an action: but Equity will not so deal with him; and if the other party can have the substantial benefit of his contract, that slight difference being of no importance to him, Equity will interfere. Thus was introduced the principle of compensation . . . where one party would be foiled at Law, but the other may have the reasonable, substantial effect of his contract, compensation shall be admitted; not where the effect will be to put upon him something constitutionally different from that for which he contracted." And again, a very little later, in *Alley* v. *Deschamps* (1806, 13 Ves. Jun. at pp. 228, 229), the same Lord Chancellor said: "This relief [specific performance] . . . was followed by another class of cases, equally clear, that where a party was not able to perform his engagement according to the strict letter, if the failure was not substantial, the other should not be permitted to take advantage of the strict form."

As to (ii.), Lord Eldon said, in *Mortlock* v. *Buller* (1804, 10 Ves. Jun. at p. 315): "I also

agree, if a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under such circumstances is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole."

The principle under discussion is open to the criticism that to give to a purchaser the remedy of specific performance of part of a contract, and also compensation for a portion of the subject-matter of the contract which the vendor is unable to convey, is virtually to make a new bargain for the parties which they have not made for themselves (see *per* Lord Watson in *Stewart* v. *Kennedy*, 1890, 15 App. Cas. at p. 102). The danger of doing this was evidently felt by Lord Erskine (see *Halsey* v. *Grant*, 1806, 13 Ves. Jun. at p. 76); but he nevertheless was enthusiastic enough about the principle of compensation to say of it: "This

is the perfection of our jurisdiction. If the rigid construction of the Law were relaxed, there would be no safety; but the system is rendered perfect by this healing power of Equity" (*S.C.*, at p. 77).

The following cases, selected out of the many which occur in the Reports, may serve to illustrate the application and limits of the principle :—

(i.) Vendor plaintiff—

(*a*) Specific performance with compensation granted (*Calcraft* v. *Roebuck*, 1790, 1 Ves. Jun. 221—186 acres sold as freehold, two acres being in fact held only from year to year).

(*b*) Specific performance with compensation refused (*Binks* v. *Lord Rokeby*, 1818, 2 Swans. at p. 222—estate sold as tithe free, but in fact subject to tithe).

(ii.) Purchaser plaintiff—

(*c*) Specific performance with compensation granted (*Hooper* v. *Smart*, 1874, L. R. 18 Eq. 683—contract to sell the entirety of freeholds, the vendors being in fact entitled to a moiety only).

(*d*) Specific performance with compensation refused (*Edwards Wood* v. *Marjoribanks*, 1860, 7 Cl. H. L. 806—contract to sell advowson, and discovery by purchaser, after acceptance of title, that the living was subject to a Queen Anne's Bounty mortgage).

Other cases will be found collected in Seton, 5th ed., at pp. 1879, 1880; see, too, *Connor* v. *Potts*, [1897] 1 I. R. 534, stated *infra*, p. 114.

It is, however, to be observed that the principle of compensation will not be applied at the instance of a plaintiff who does not come into Court with clean hands, as, for instance, where he has been guilty of misrepresentation (see *per* Plumer, M. R., in *Clermont* v. *Tasburgh*, 1819, 1 Jac. & W. at pp. 120, 121). Nor will it generally be applied where the purchaser was, at the time of entering into the contract, aware of the defect, whether arising from the vendor's inability to convey the whole of the estate the subject of the contract (*Castle* v. *Wilkinson*, 1870, L. R. 5 Ch. 534), or from a patent misdescription (*Dyer* v. *Hargrave*, 1805, 10 Ves. Jun. 505)—though *secus* in the case of a latent defect (*ibid.* at p. 509); nor where a purchaser has waived the right to compensa-

tion, either expressly or impliedly, as by taking possession (*Burnell* v. *Brown*, 1820, 1 Jac. & W. 168); nor where the proper amount of compensation is not capable of being ascertained (*Lord Brooke* v. *Rounthwaite*, 1846, 5 Hare, at pp. 303—305); nor where the enforcement of the contract against the vendor would be prejudicial to third persons interested in the property (*Thomas* v. *Dering*, 1837, 1 Keen, at p. 747); nor where, the contract saying nothing about compensation, the purchaser or lessee has taken his conveyance or lease (*Clayton* v. *Leech*, 1889, 41 Ch. D. 103).

The case of indemnity against a defect of title differs in some respects from compensation. The Court will not, generally, compel a purchaser to take, or a vendor to give, an indemnity (see and compare *Halsey* v. *Grant*, 1806, 13 Ves. Jun. at p. 79; *Horniblow* v. *Shirley*, 1806, 13 Ves. Jun. 81; *Balmanno* v. *Lumley*, 1813, 1 Ves. & Bea. at p. 225).

Thus far the general principles of the Court, applicable in cases where there is no special contract relative to compensation, have been considered and illustrated. Where there is an express stipulation on the subject—and not only in conditions of sale on sales by public auction, but also in formal agreements for sale

by private contract, there is usually a clause providing for, or negativing, the allowance of compensation — the special contract between the parties supersedes or supplements the general rule, and the Court is remitted to the duty of construing the contract according to the ordinary rules of construction (see *per* Lord Campbell in *Cordingly* v. *Cheeseborough*, 1862, 4 De G. F. & J. Ch. at p. 385).

Accordingly, a vendor may be entitled to defeat the purchaser's claim under a stipulation for compensation, by rescinding the contract pursuant to another stipulation empowering him so to do (*Mawson* v. *Fletcher*, 1870, L. R. 6 Ch. 91); a purchaser may, where there has been material misrepresentation in the particulars of sale, successfully resist performance, notwithstanding a condition, in terms binding him to take compensation for any mistakes or errors in the particulars, but construed by the Court to apply only to accidental slips (*Dimmock* v. *Hallett*, 1866, L. R. 2 Ch. 21); a vendor defendant may, notwithstanding a stipulation providing for his making compensation for errors of any kind in the description of the property, be relieved from compensating the purchaser for even a large deficiency in the stated quantity of the land sold, where there is

also a stipulation expressly negativing compensation for error in the admeasurements (*Cordingly* v. *Cheeseborough*, 1862, 4 De G. F. & J. Ch. 379); and a purchaser may, by force of a condition of sale that, if any error in the particulars be discovered, compensation shall be allowed by the vendor, obtain compensation for an error not discovered until after the execution of the conveyance (*Palmer* v. *Johnson*, 1884, 13 Q. B. D. 351).

CHAPTER IX.

DAMAGES.

When the equitable jurisdiction in relation to specific performance had become established, a party to a contract falling within the scope of that jurisdiction had two remedies open to him, in the event of and against the other party refusing or omitting to perform his part of the contract: he might either institute a suit in Equity for specific performance, or bring an action at Common Law for damages for the breach. And that being so, and partly, perhaps, because it was content with its victory over the opposition of the Courts of Law to its peculiar jurisdiction, the Court of Chancery appears to have been for a long time indisposed, generally, to give relief by way of damages for breach of contract. "My opinion is," said Lord Eldon, in *Todd* v. *Gee* (1810, 17 Ves. Jun. at p. 278), "that this Court ought not, except under very particular circumstances, as there

may be, upon a bill for the specific performance of a contract to direct an issue, or a reference to a Master, to ascertain the damages. That is purely at Law. It has no resemblance to compensation."

Experience, however, showed that cases from time to time occurred in which, though the contract sued upon was one of which specific performance might, in accordance with the principles and rules of the Court of Chancery, be granted, justice would best be done by giving damages; and it was obviously expedient that, in such a case, that Court should not send its suitor away to seek relief in a Court of Law, but should itself dispose of the whole matter.

Accordingly, in the year 1858, an Act, usually called Lord Cairns' Act (21 & 22 Vict. c. 27), was passed, by the second section of which it was enacted as follows:—"In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against the breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such

injunction or specific performance; and such damages may be assessed in such manner as the Court shall direct."

It is to be noticed that the language of this section made it a condition precedent to the exercise of the discretionary power of awarding damages thereby conferred, that the case should be one in which an injunction or specific performance might be granted. Therefore, where, at the time of the commencement of the litigation, relief by way of specific performance was impossible—as where, for instance, a plaintiff sought to enforce the allotment to him of some shares, and all the shares had been allotted to other persons before the filing of the bill (*Ferguson* v. *Wilson*, 1866, L. R. 2 Ch. 77)—the plaintiff could not, under Lord Cairns' Act, get damages.

But by virtue of the Judicature Act, 1873 (see ss. 16, 24(7), 25 (11), and 76), not only the jurisdiction under Lord Cairns' Act, but also all the jurisdiction in relation to damages which previously was vested in, or capable of being exercised by, the Common Law Courts, became vested in the High Court of Justice. It follows that, whether the High Court can or cannot, in any particular case, grant specific performance, it can give damages for breach of the contract;

so that the Court has now a much larger power than it had under Lord Cairns' Act; for whereas, under that Act, the plaintiff had first to make out that he was entitled to an equitable remedy before he could get damages at all, now he may come to the Court and say, "If you think I am not entitled to specific performance of the whole or any part of the contract, then give me damages" (see *per* Kay, J., in *Elmore* v. *Pirrie*, 1887, 57 L. T. N. S. at p. 333, and *per* Cotton, L.J., in *Tamplin* v. *James*, 1879, 15 Ch. D. at p. 222).

Still, in a case in which a plaintiff chose to bring his action to trial, on a pleading in which, alleging his willingness to perform and offering to perform a contract, he claimed specific performance, and added a merely alternative claim for damages as a substitute for specific performance, it was held that the Judicature Act, 1873, made no difference to the construction of such a claim; and, it appearing that the plaintiff had, by selling the property in question, rendered specific performance impossible, the claim for damages failed also (*Hipgrave* v. *Case*, 1885, 28 Ch. D. 356; and see *Lavery* v. *Pursell*, 1888, 39 Ch. D. 508, in which case, however, the question whether damages might have been given under

the Judicature Act, 1873, does not appear to have been considered).

Lord Cairns' Act—which applied to cases where the damages were merely nominal, as well as to those where they were substantial—was repealed in the year 1883 by the Statute Law Revision Act of that year (46 & 47 Vict. c. 49), but the jurisdiction of the Court under the repealed Act has not been affected by the repeal, being preserved by sect. 5 of the repealing Act itself (see *Sayers* v. *Collyer*, 1884, 28 Ch. D. at p. 107). Nowadays, however, a plaintiff suing upon a contract will generally, it is conceived, prefer to invoke, as regards damages, the Court's power under the Judicature Act, 1873, rather than the jurisdiction which Lord Cairns' Act conferred.

The following cases may be referred to as illustrations of the manner in which the Court of Chancery, and the Chancery Division of the High Court, successively have, since the passing of Lord Cairns' Act, exercised their respective powers of granting relief by way of damages:—

Soames v. *Edge* (1860, John. 669)—B. having agreed to build a house on land of A.'s, and to accept from A. a lease of the land and house, which lease A. agreed to grant when the house

should have been built, it was held, on B. making default in building, that A. was entitled to damages for the non-building, and also to specific performance of the contract to accept a lease.

Jaques v. *Millar* (1877, 6 Ch. D. 153)—A. having agreed to take a lease of works belonging to B. for the purpose, as B. knew, of carrying on there an oil-refiner's business, and having, owing to B.'s refusal to grant the lease, been delayed for fifteen weeks in commencing the business, it was held that A. was entitled to judgment for specific performance, and also to damages (which the judge assessed at the trial) for loss of business profits during the fifteen weeks.

Royal Bristol Permanent Building Society v. *Bomash* (1887, 35 Ch. D. 390)—Judgment for specific performance of a contract for sale of houses, and for payment by the vendor to the purchaser of damages for (1) the latter's loss of a tenant by reason of the vendor having failed to give possession on the day fixed for completion, and (2) deterioration of the property subsequently to the contract.

Foster v. *Wheeler* (1888, 38 Ch. D. 130)—Contract between A. and B., that B. would enter into an agreement with A.'s landlord for

a lease of a house in A.'s occupation, and that thereupon A. would surrender his lease. B. having refused to perform her part of this contract, it was held that, though specific performance could not be granted, A. was entitled to damages for B.'s breach of contract.

In connection with this subject of damages, it is to be remembered that, upon a contract for sale and purchase of real estate, if the vendor, without fraud, is incapable of making a good title, the intending purchaser is not entitled to recover compensation in damages for the loss of his bargain. Even if a person enters into a contract to sell real estate, knowing that he has no title to it, nor any means of acquiring it, the intending purchaser cannot, by an action founded on breach of the contract, recover any damages beyond expenses actually incurred (*e.g.* costs of and incidental to investigation of the title, which he may recover in the nature of damages). Other damages he can only recover by means of an action for deceit, in which he would, in order to succeed, have to prove actual fraud on the part of the vendor (see *Bain* v. *Fothergill*, 1873–74, L. R. 7 H. L. at pp. 201, 207; *In re Scott and Alvarez' Contract*, [1895] 1 Ch. at p. 627; *Gas Light and Coke Co.* v. *Towse*, 1887, 35 Ch. D.

at p. 543; and Sugden, Vendors and Purchasers, 14th ed., p. 358).

Where a case for damages is made, the damages are sometimes assessed by the judge at the trial, and the judgment directs payment of the amount so assessed; otherwise, the judgment directs an inquiry to be made as to what damages have been sustained by the plaintiff, or as to what sum of money ought to be allowed and paid by the defendant to the plaintiff by way of damages, with a consequential direction for payment of the damages when certified (for Forms, see Seton, 5th ed., pp. 1833, 1886, 1887).

Where, on a summons under the Vendor and Purchaser Act, 1874, the decision is that a good title has not been shown, the Court has jurisdiction to order the vendor to pay to the purchaser, as in the nature of damages, interest on his deposit and the costs of investigating the title (*In re Hargreaves and Thompson's Contract*, 1886, 32 Ch. D. 454); but damages by way of compensation to a purchaser for loss occasioned by the vendor's delay in completion cannot be given on such a summons (*In re Wilsons and Stevens' Contract*, [1894] 3 Ch. 546).

Where, upon the defendant's non-compliance with a judgment for specific performance, the

plaintiff obtains an order for rescission of the contract, he cannot, according to *Henty* v. *Schröder* (1879, 12 Ch. D. 666, a decision which seems open on this point to criticism), have also an order for damages for breach of the contract.

CHAPTER X.

INJUNCTION.

THE power of granting an injunction, "the strong arm of Equity," as an American Judge has called it (Mr. Justice Baldwin, quoted in 2 Story's Equit. Jurispr., 13th ed., p. 264, note), is a very valuable and efficient instrument of the Court in dealing with questions of specific performance, and has in times past, like specific performance, encountered and overcome no little hostility on the part of Common Law tribunals.

To restrain by injunction the doing of acts contravening the stipulations of a contract operates, in effect, to enforce those stipulations specifically (see *Lumley* v. *Wagner*, 1852, 1 De G. M. & G. Ch. at pp. 615, 616; and *per* Kay, L.J., in *Davis* v. *Corporation of Leicester*, [1894] 2 Ch. at p. 231). And so, where a contract contains positive as well as negative terms, and the former are capable of being specifically enforced (as, for instance, in *Rankin* v. *Huskisson*, 1830, 4 Sim. 13), the enforcement of the whole of the contract may be effected by means of a

judgment directing performance of the positive terms, and restraining by injunction the breach of any of the negative terms.

In the noteworthy case of *Lumley* v. *Wagner* (1852, 1 De G. M. & G. Ch. 604) Lord St. Leonards went a step further, and, dealing with a contract between Mr. Lumley and Mademoiselle Wagner, by which she agreed to sing at his theatre during a period of three months and not to sing elsewhere during that period, he granted an injunction to restrain a breach of the negative stipulation, although the performance of the positive stipulation could not have been specifically enforced.

This decision, and some few similar ones, before and after its date, which are to be found in the Reports, must be regarded, it is conceived, as instances of an exception from the general rule already adverted to (*supra*, p. 16), that a partial specific performance will not be granted where the Court cannot enforce the whole of the contract. The exception appears to be limited to cases in which the contract contains (as in *Lumley* v. *Wagner*) an express, as distinguished from an implied, negative term; a ground of distinction which no less eminent an authority than Lord Selborne has characterised as "highly artificial and tech-

nical" (*Wolverhampton, &c. Rail. Co.* v. *L. & N. W. Rail. Co.*, 1873, L. R. 16 Eq. at p. 440). For "every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do" (*per* Lindley, L.J., in *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. at p. 426).

Accordingly, the practitioner will probably do well to follow the high authority just cited in looking upon *Lumley* v. *Wagner* "rather as an anomaly, to be followed in cases like it, but an anomaly which it would be dangerous to extend" (see the last-cited case at p. 428; also *Fothergill* v. *Rowland*, 1873, L. R. 17 Eq. at p. 141; and *Davis* v. *Foreman*, [1894] 3 Ch. 654).

"The tendency of recent decisions . . . is towards this view—that the Court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract whether it contain or does not contain a negative stipulation; but that if, on the other hand, the breach of the contract is properly satisfied by damages, then that the Court ought not to interfere whether there be or be not the negative stipulation" (*per*

Fry, L.J., in *Donnell* v. *Bennett*, 1883, 22 Ch. D. at p. 837).

Besides the cases in which an injunction is used by the Court as an instrument for enforcing specific performance, there are many in which the grant of an injunction may be incidental to proceedings for such enforcement.

If, for instance, A. had agreed to sell an estate to B., and then threatened to deal with the estate in such a manner as to prevent himself from performing his contract, the Court, in an action by B. for specific performance, would interfere, by interlocutory injunction, to restrain any such improper dealing by A. (see *Heathcote* v. *North Staffordshire Rail. Co.*, 1850, 2 Mac. & G. at p. 112; and *Hadley* v. *The London Bank of Scotland*, 1865, 3 De G. J. & S. Ch. at p. 70). For another instance, see *Attwood* v. *Barham*, 1826, 2 Russ. 186. And, in some cases of sales of land to railway companies (*e.g. Allgood* v. *Merrybent, &c. Rail. Co.*, 1886, 33 Ch. D. 571), after judgment directing payment of the purchase-money and default in payment, an injunction has, at the instance of the unpaid vendor, been granted, restraining the company from running trains over the land, and from continuing in possession of it.

The jurisdiction exercised in granting in-

junctions is in an eminent degree discretionary (*Low* v. *Innes*, 1864, 4 De G. J. & S. Ch. at p. 290; *Dietrichsen* v. *Cabburn*, 1846, 2 Ph. Ch. at p. 53); but Lord Cairns' Act (quoted *supra*, p. 67) has not altered the settled principles upon which Courts of Equity previously acted in interfering by way of injunction (*Shelfer* v. *City of London, &c. Co.*, [1895] 1 Ch. 287).

CHAPTER XI.

THE ACTION—TRIBUNAL.

Actions for the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases, are, by sect. 34 of the Judicature Act, 1873, expressly assigned (subject to the powers of transfer exerciseable under the Judicature Acts and Rules of Court) to the Chancery Division of the High Court of Justice. Actions for the specific performance of other contracts are not expressly assigned to any Division of the Court, but in practice they mostly find their way to the Chancery Division.

County Courts have a concurrent (but not exclusive) jurisdiction, and can exercise all the power and authority of the High Court, in actions for specific performance of agreements for the sale, purchase, or lease of any property, where in the case of sale or purchase the purchase-money, or in the case of a lease the value of the property, does not exceed the sum of £500 (see *Foster* v. *Reeves*, [1892] 2 Q. B. 255); and in relation to such actions the County Court

judge has all the powers and authorities of a judge of the Chancery Division (County Courts Act, 1888, s. 67). But where, in an action for specific performance on the Equity side of the Mayor's Court of London, it appeared that the whole cause of action had not arisen within the jurisdiction of that Court, the defendants were held to be entitled to a writ of prohibition (*Bowler* v. *Barberton, &c. Syndicate*, [1897] 1 Q. B. 164).

It may here be mentioned that, in certain cases of agreements for sale of Irish holdings, the Irish Land Commission has jurisdiction to make a decree for specific performance, by virtue of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), s. 22; also that, by the Supreme Court of Judicature Act (Ireland), 1877, there are expressly assigned, to the Chancery Division of the High Court of Justice in Ireland, not only actions for the specific performance of contracts between vendors and purchasers of land, including contracts for leases, but also actions for the specific performance of any other contracts in respect of which a Court of Equity decrees performance.

CHAPTER XII.

PARTIES.

THE general rule is that the parties to a specifically-enforceable contract, and they alone, are the proper parties to an action for enforcing specific performance of it (see *Tasker* v. *Small*, 1837, 3 Myl. & Cr. at p. 68). But there are various events and circumstances which modify, or create exceptions from, this rule.

I. The death of a party may occur before the contract has been carried into effect.

If the contract is for sale of realty, and the vendor dies before completion, his personal representative may sue the purchaser for specific performance; for the personal representative is entitled to receive the purchase-money. In the Court of Chancery the vendor's heir (*i. e.* his heir-at-law or customary heir, according to the tenure of the property), or devisee, was required to be made a party to such a suit, as being interested in disputing the validity of the contract (*Roberts* v. *Marchant*, 1843, 1 Ph.

Ch. at pp. 373, 374; see also *Buckmaster* v. *Harrop*, 1802, 1807, 7 Ves. Jun. at p. 343; 13 Ves. Jun. at p. 472; *Broome* v. *Monck*, 1805, 10 Ves. Jun. at p. 611; *Townsend* v. *Champernowne*, 1821, 9 Price, Ex. 130).

This rule was not affected by the Judicature Acts; and it is conceived that, for the reason already given, the vendor's heir or devisee, as well as his personal representative, is still a necessary party, where the date of the vendor's death is subsequent to the 1st January, 1898 (the date when Part I. of the Land Transfer Act, 1897, came into operation), even although the case be one of a contract for sale of real estate, which, not being land of copyhold tenure proper (sub-sect. (4) of sect. 1 of the last-mentioned Act), has vested in the vendor's personal representative under the 1st section of that Act. Similarly, if, after the vendor's death, the purchaser sues for specific performance, he should, it is conceived, make not only his personal representative, but also his heir or devisee, a defendant.

If, on the other hand, the purchaser dies before completion of a contract for sale of real estate, either (1) the vendor may sue for specific performance, making the purchaser's personal representative (who has to pay the purchase-

money, and may have a case for disputing the validity of the contract), and also the purchaser's heir or devisee (who is equitably entitled to the property, and interested in seeing that a proper title is made out), the defendants; or (2) the purchaser's heir or devisee may sue the vendor, making the purchaser's personal representative either a co-plaintiff or a defendant.

It is conceived that nowadays, in the case of a contract for sale of freehold property, the equitable estate which passes by the contract to the purchaser (*Shaw* v. *Foster*, 1872, L. R. 5 H. L. at pp. 338, 349) will, in the event of his death before completion, vest in his personal representative by virtue of the 1st section of the Land Transfer Act, 1897, and will be subject to the subsequent provisions of Part I. of that Act, including those with respect to assent and conveyance by the personal representative (sects. 2 and 3). If this view is correct—the language of the Act is not satisfactorily clear on the point—a deceased purchaser's personal representative, in whom an equitable estate in freehold property is vested under the deceased's contract, may, it is conceived, maintain an action against the vendor for specific performance of the contract; but, in such a case, the

purchaser's heir or devisee ought, generally, to be made a party to the action.

When a deceased vendor's heir is an infant, and the property is such that it is not vested in, and clearly capable of being conveyed by, the personal representative (Land Transfer Act, 1897, sects. 1 (4) and 2 (2): see, too, Conveyancing Act, 1881, sect. 4), recourse may have to be had to the provisions of the Trustee Act, 1893 (see sects. 26 (ii) (*a*), 31, and 32), in order to effectuate the transfer of the legal estate: but judgment must, usually, be obtained in an action (as distinguished from a petition), in order that those provisions may be made use of (compare *In re Colling*, 1886, 32 Ch. D. 333, and *In re Cuming*, 1869, L. R. 5 Ch. 62).

Where the contract relates to leasehold or other personal property, and either vendor or purchaser dies before completion, the personal representative of the deceased party stands in his shoes for the purpose of suing or being sued for specific performance, unless the contract was of such a nature as to be personal (see *infra*, p. 86) to the deceased.

If a deceased vendor of real estate has left a widow who, but for the contract, would be entitled to dower or freebench, she should be made a party to the purchaser's action, and

the contract may be enforced against her (see the Dower Act, 1833, sect. 5; *Hinton* v. *Hinton*, 1755, 2 Ves. 638).

A contract to take a lease may be enforced against the proposed lessee's executors, but the Court will take care that the lease is so framed as not to impose personal liability upon them (*Stephens* v. *Hotham*, 1855, 1 Kay & J. 571).

Where the performance of a contract requires the exercise of personal skill or taste by one party, his death puts an end to the contract, and his executors are under no liability in respect of it (see *per* Parke, B., in *Siboni* v. *Kirkman*, 1836, 1 Mee. & W. at p. 423).

II. There may have been an assignment by instrument *inter vivos*, or by operation of law.

In the case of an assignment by instrument *inter vivos*, the assignee of the benefit of the contract may generally sue for performance (making the assignor a party), unless the contract is one which requires some personal skill or discretion for its performance by the assignor, or is otherwise personal to him, or being, for instance, an agreement for a lease, contains a stipulation prohibiting assignment of the lease (see *Crosbie* v. *Tooke*, 1833, 1 Myl. & K. 431; *Buckland* v. *Papillon*, 1866, L. R. 2 Ch. 67; *S. C.* L. R. 1 Eq. at p. 481; *O'Herlihy* v. *Hedges*, 1803, 1

Sch. & Lef. 123; 9 R. R. 23; *Flood* v. *Finlay*, 1811, 2 Ball & B. 9; 12 R. R. 55).

But a merely equitable assignee of a lease is not entitled to maintain an action against the lessor, or the lessor's assigns, for performance of a contract for purchase of the freehold, alleged to have been constituted by a notice by the equitable assignee of intention to exercise an option of purchase, given, by a covenant in the lease, to the legal assigns of the lessee (*Friary Holroyd and Healey's Breweries* v. *Singleton*, [1899] 1 Ch. 86).

If A., after contracting to sell or let property to B., conveys it to C., an action for specific performance of the contract may generally be maintained by B., not only against A., but also against C., unless the latter has obtained the legal estate for value, and without notice of the contract (*e.g. Meux* v. *Maltby*, 1818, 2 Swans. 277).

The trustee in bankruptcy, or the committee in lunacy (with the sanction of the Master, and joining the lunatic as a co-plaintiff—see Ord. XVI. r. 17), of a vendor, or of a purchaser, may sue, and a vendor's or a purchaser's committee in lunacy may (together with the lunatic) be sued for specific performance. But trustees in bankruptcy

having a statutory right of disclaiming unprofitable contracts (Bankruptcy Act, 1883, s. 55; Bankruptcy Act, 1890, s. 13), a bankrupt purchaser's contract of purchase cannot be specifically enforced against his trustee without the latter's consent, while his right of disclaimer is subsisting (see *Holloway* v. *York*, 1877, 25 W. R. 627).

III. There are cases of agency.

Where persons contract expressly as agents for named principals, the principals are, generally, the only proper parties to sue or be sued (*Ex parte Hartop*, 1806, 12 Ves. Jun. at p. 352). Where, however, an agent contracts in his own name, the unnamed principal may, generally, sue or be sued (provided the contract is not personal to the apparent principal [see II. above]) without the agent being made a party; but the agent also is liable to be sued (*Higgins* v. *Senior*, 1841, 8 Mee. & W. 834; *Saxon* v. *Blake*, 1861, 29 Beav. 438; *Fowler* v. *Hollins*, 1872, L. R. 7 Q. B. at p. 624). And directors of companies are in the same position, as regards liability upon contracts, as other agents (*Ferguson* v. *Wilson*, 1866, L. R. 2 Ch. at p. 89; *Kay* v. *Johnson*, 1864, 2 Hem. & M. at p. 123).

In some cases, *e.g.* where an agent claims to be personally interested (*Heard* v. *Pilley*, 1869,

L. R. 4 Ch. at p. 551), or where an auctioneer, as agent for both parties to a sale, is holding a deposit of large amount (*Earl of Egmont* v. *Smith*, 1877, 6 Ch. D. at pp. 474, 475), an agent may properly be joined as a party to the action. And it may here be mentioned that there are cases in which a company may be sued upon a contract made by its projectors before its incorporation (see and compare *Edwards* v. *Grand Junction Rail. Co.*, 1836, 1 Myl. & Cr. at p. 672; *Eastern Counties Rail. Co.* v. *Hawkes*, 1855, 5 Cl. H. L. 331; and *Preston* v. *Liverpool, &c. Rail. Co.*, 1856, *ibid.* 605).

IV. There are cases not falling within any of the foregoing heads, in which a third person, not named as a party to a contract, may sue or be sued upon or in connection with it.

Thus, if the contract, though in form made between A. and B., is intended to secure a benefit to C., so that C. is entitled to say he has a beneficial right as *cestui que trust* under it, C. may enforce the contract against A. and B. (*Gandy* v. *Gandy*, 1885, 30 Ch. D. at p. 67). Again, children born of a marriage, in contemplation of which a settlement was executed under which they are interested, may sue for the execution of the trusts of that settlement (*Green* v. *Paterson*, 1886, 32 Ch. D. at p. 106; and cp. *Hill*

v. *Gomme*, 1839, 5 Myl. & Cr. 250). And a third person, who is in possession of land, the subject of the contract, and will be affected by the judgment (*Bishop of Winchester* v. *Mid-Hants Rail. Co.*, 1867, L. R. 5 Eq. at p. 21), or who claims an interest in the purchase-money on the ground of some agreement with the vendor (*West Midland Rail. Co.* v. *Nixon*, 1863, 1 Hem. & M. at p. 181), may properly be joined as a defendant to an action for specific performance of the contract.

V. Where the contract sued upon relates to registered land or a registered charge.

In such cases the Court may cause third persons, who have registered estates or rights in the land or charge, or have entered up notices, charges, or inhibitions against the same, to appear in the action, and show cause why the contract should not be specifically performed (Land Transfer Act, 1875, s. 93).

VI. The recent case of *Ecclesiastical Commissioners* v. *Pinney* ([1899] 1 Ch. 99) is a peculiar one. The Commissioners had been consenting parties to a contract by a vicar for sale of glebe lands. Upwards of twenty-two years after the date of the contract, no purchase-money having been paid and no conveyance executed, but interest on the purchase-money having, ever

since the contract, been paid to the vicar for the time being by a series of tenants for life in possession of the purchased lands, the Commissioners, to whom, under the Ecclesiastical Leasing Acts, 1842 and 1858, the purchase-money was payable, brought an action for specific performance, or, in the alternative, for enforcement of vendor's lien. It was held by the Court of Appeal that the Commissioners had at least a *primâ facie* right of action, they not being merely in the position of persons consenting to an ordinary contract, but themselves having important statutory duties to perform in relation to the transaction.

CHAPTER XIII.

PLEADING—TRANSFER—NE EXEAT.

Pleading.—The pleadings in an action for specific performance are governed, of course, by the ordinary rules of pleading, and the parties must play the game of litigation according to the rules. Still, it may, perhaps, be useful to remind practitioners of the following points.

A plaintiff seeking specific performance should take care, in his Statement of Claim (if any), to plead a complete, clear, and specifically enforceable contract, and also to describe the subject-matter of the contract clearly. Otherwise, in the event of there being default in delivery of a Defence, he will not be in a position to obtain judgment under Ord. XXVII. r. 11; for, on an application under that rule, he will not be allowed to supplement his pleading by putting in the written agreement (if any) or other evidence (*Smith* v. *Buchan*, 1888, 36 W. R. 631).

Where a purchaser is plaintiff, he may ask, in the alternative, for rescission of the contract,

and return of any deposit which he may have paid (see *Levy* v. *Stogdon*, [1899] 1 Ch. at p. 10). And where a contract of sale contains the usual condition, empowering the vendor, in the event of default by the purchaser, to forfeit the deposit and resell the property, the vendor suing for performance may claim, in the alternative, a declaration that he is entitled to forfeit and resell in accordance with the condition. It is, however, prudent in such cases to put forward the alternative claim not only in the Statement of Claim, but also in the indorsement on the writ (see *Kingdon* v. *Kirk*, 1887, 37 Ch. D. 141). Similarly, a vendor plaintiff, who may desire to obtain, at the trial, a declaration of vendor's lien, should be careful to ask expressly for it in writ and pleading (*Tacon* v. *National Standard Land, &c. Co.*, 1887, 56 L. T. N. S. 165).

It is permissible, where the Statute of Frauds does not create a bar, to combine in one and the same pleading claims for rectification of a written contract, and for specific performance of the contract as rectified (*Olley* v. *Fisher*, 1886, 34 Ch. D. at p. 370).

A defendant, where there are pleadings, should take care to plead distinctly, in his Defence, every ground of defence which may, in the particular case, be available, *e.g.* non-

compliance with the provisions of the Statute of Frauds (Ord. XIX. r. 15; *Odhams Brothers* v. *Brunning*, 1896, 74 L. T. N. S. 370; *James* v. *Smith*, [1891] 1 Ch. at p. 389; and see *infra*, Chapter XIV.).

If what the defendant wants is not simply to defeat the plaintiff's claim—if, for instance, he desires rescission, setting aside, or rectification of the contract, or repayment of deposit—he should counterclaim for it.

In a recent case, "bristling with points," a purchaser, who had failed in the High Court and in the Court of Appeal, on a summons under the Vendor and Purchaser Act, 1874, challenging the vendor's title, and was then sued by the vendor for specific performance, was allowed to reopen the question by bringing "an action of review by way of counter-claim" notwithstanding the order of the Court of Appeal, on the ground that, since the date of that order, he had for the first time discovered certain material facts, which showed the vendor's title to be defective (*In re Scott and Alvarez' Contract*, [1895] 1 Ch. 596, 621; 2 Ch. at pp. 610, 611).

Transfer.—It may happen that a defendant sued, in the Queen's Bench Division, for recovery of land, for instance, or for return of

a deposit, has a cross-claim against the plaintiff for enforcement of a contract relating to or connected with the subject-matter of the action. In such a case, the defendant may, in his pleading, counter-claim to have the contract specifically performed, and for that purpose to have the action transferred to the Chancery Division: he will then be in a position to apply, by summons, for the transfer (*Holloway* v. *York*, 1877, 2 Ex. D. 333). It is not, however, by any means a matter of course that the order for transfer will be made (compare *Storey* v. *Waddle*, 1879, 4 Q. B. D. 289, and *London Land Co.* v. *Harris*, 1884, 13 Q. B. D. 540).

The Queen's Bench Division will always, pursuant to sect. 24 (4) of the Judicature Act, 1873, "recognize and take notice of" an equitable right to specific performance appearing incidentally in the course of an action (*Williams* v. *Snowden*, 1880, W. N. 124).

Ne Exeat.—The Court of Chancery, in some cases, on interlocutory application by the vendor in a suit for specific performance, granted a writ of *ne exeat regno* to issue against the purchaser, with the object of protecting the vendor against loss of the agreed purchase-money, by reason of the purchaser going abroad without paying or securing the payment of it.

The circumstances under which this writ might be granted were discussed at length by Lord Eldon in *Boehm* v. *Wood* (1823, Turn. & R. at pp. 343 *et seq.*; see, too, *Morris* v. *McNeil*, 1827, 2 Russ. at p. 605).

The writ has not been abolished: but, under the present practice, it probably will not be issued in any case which does not fall within the provisions of sect. 6 of the Debtors Act, 1869, by which section arrest upon mesne process was done away with, and a limited power of arresting, under certain specified circumstances, a defendant about to quit England was conferred, and is now (Judicature Act, 1873, s. 76) exerciseable by the judges of the High Court (see *Drover* v. *Beyer*, 1879, 13 Ch. D. at pp. 243, 244; *Hands* v. *Hands*, 1881, 43 L. T. N. S. 750; *Colverson* v. *Bloomfield*, 1885, 29 Ch. D. at pp. 342, 343; and Ord. LXIX.).

CHAPTER XIV.

GROUNDS OF DEFENCE.

GENERALLY, it is a good defence to show that the particular case before the Court falls within some or one of those classes of cases already adverted to (*supra*, pp. 14—17), in which the Court declines, as a rule, to enforce specific performance. It may, however, be convenient to the practitioner to have this general statement supplemented by some concise particulars of the principal grounds of defence, upon which, when the circumstances of the particular case render any of them appropriate and available, a defendant to an action for specific performance may rely.

Ambiguity.—Where the terms of a contract are ambiguous, the Court may on that ground refuse to enforce it (*Clowes* v. *Higginson*, 1817, 1 Ves. & Bea. at p. 533; *Harnett* v. *Yielding*, 1805, 2 Sch. & Lef. at p. 558; 9 R. R. at p. 104; and see the cases cited *infra* under the head ***Uncertainty***).

Breach of Trust.—The Court will not give, even to an innocent purchaser, the relief of specific performance, where trustees have con-

tracted to sell to him under circumstances rendering the sale a breach of trust on their part (*Ord* v. *Noel*, 1820, 5 Madd. 438); and a purchaser or intended lessee may set up such a breach by way of defence (*Dunn* v. *Flood*, 1885, 28 Ch. D. at p. 593; *Tolson* v. *Sheard*, 1876, 5 Ch. D. at p. 25; see, too, p. 16, *supra*). Other cases illustrating this principle are *Dance* v. *Goldingham*, 1873, L. R. 6 Ch. at pp. 911, 913; and *Oceanic, &c. Co.* v. *Sutherberry*, 1880, 16 Ch. D. at p. 244.

Condition.—It may afford a defence that the contract was, in its inception, conditional or contingent, and has not become absolute (*Regent's Canal Co.* v. *Ware*, 1857, 23 Beav. at p. 586), or that some condition precedent has not been performed by the plaintiff (*Williams* v. *Brisco*, 1882, 22 Ch. D. at p. 449), or cannot be fulfilled (*Modlem* v. *Snowball*, 1861, 31 L. J. Ch. 44).

Consideration.—That absence of consideration may be a ground of defence has already been indicated (*supra*, p. 16). Reference may also be made, on this topic, to *Cochrane* v. *Willis*, 1865, L. R. 1 Ch. at pp. 63, 64, and to the observations of Lindley, L.J., in *Stephens* v. *Green*, [1895] 2 Ch. at p. 162. With respect to inadequacy of consideration, see *infra*, p. 105, under the head ***Hardship.***

Corporation.—Inasmuch as, subject to some exceptions based upon convenience (see cases cited in *Young & Co.* v. *Mayor, &c. of Royal Leamington Spa*, 1883, 8 App. Cas. at pp. 524, 525) or authorized by statute (*e.g.* the Companies Clauses Consolidation Act, 1845, s. 97, and the Companies Act, 1867, s. 37), the general rule of law is that a corporation cannot bindingly contract otherwise than under its common seal, the fact that the contract sued on is not under seal may be a defence (*e.g. Mayor, &c. of Oxford* v. *Crow*, [1893] 3 Ch. 535). But this defence will not avail where there has been part performance (see cases cited in *Melbourne Banking Corporation* v. *Brougham*, 1878–79, 4 App. Cas. at p. 169).

Coverture.—This may still, in some cases (*e.g. Castle* v. *Wilkinson*, 1870, L. R. 5 Ch. 534; and see ***Incapacity,*** *infra*, p. 109) be a ground of defence for a married woman. But the effect of the Married Women's Property Act, 1882, has been to enlarge very greatly the region of separate property, in which married women can exercise all the rights, and experience some of the liabilities, arising from contracts; and, by the amending Act of 1893 (56 & 57 Vict. c. 63, s. 1), every contract thereafter entered into by a married woman otherwise than as agent (a) is to be

deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) binds all separate property which she may at that time or thereafter be possessed of or entitled to; and (c) is also enforceable, by process of law, against all property which she may thereafter, while discovert, be possessed of or entitled to. But separate property subject to a restraint on anticipation is expressly excepted from the operation of the foregoing enactment.

Default of Plaintiff.—A defendant may successfully resist performance by establishing that the plaintiff has not performed some essential term, express or implied, of the contract, which was performable by him (*e.g. Tildesley* v. *Clarkson*, 1852, 30 Beav. at p. 426), or, being a tenant for life, has omitted to take some step which he ought, pursuant to the Settled Land Acts, to have taken (*per* Lindley, L.J., in *Mogridge* v. *Clapp*, [1892] 3 Ch. at p. 395), or has not fulfilled some material representation, as to his own future plans or acts, made by him at the time of, and as an inducement for, the contract (*Beaumont* v. *Dukes*, 1822, Jac. at pp. 424—426; *Lamare* v. *Dixon*, 1873, L. R. 6

H. L. at p. 428), provided, of course, that the defendant has not waived or occasioned the default.

Again, it is a ground of defence that the plaintiff has disabled himself from effectually performing his part of the contract by committing an act of bankruptcy, or a felony (*Franklin* v. *Lord Brownlow*, 1808, 14 Ves. Jun. at pp. 556, 557; *Willingham* v. *Joyce*, 1796, 3 Ves. Jun. at p. 169), or has been wilfully guilty of acts or omissions disentitling him to relief (*e.g. Gregory* v. *Wilson*, 1852, 9 Hare, at p. 686).

Delay.—A binding contract may be constituted by offer and acceptance; but where the accepting party is plaintiff, and his acceptance has been unreasonably delayed, the defendant may plead no contract (*e.g. Williams* v. *Williams*, 1853, 17 Beav. at p. 216).

Further, though the contract be admitted, a defence may be raised by showing that there has been undue delay by the plaintiff in performing his part of the contract, or in commencing (*Levy* v. *Stogdon*, [1898] 1 Ch. at p. 484; [1899] 1 Ch. 5) or prosecuting his action; particularly where the subject-matter of the contract is of a speculative or fluctuating character, as, for instance, a reversionary in-

terest, or a tavern (*Spurrier* v. *Hancock*, 1799, 4 Ves. Jun. 667; *Mills* v. *Haywood*, 1877, 6 Ch. D. p. 202); unless, indeed, the defendant has himself occasioned the delay, or has waived his right to object on the score of it. "What is the remedy of a purchaser [of a reversion] who cannot get what he wants? He can bring an action for specific performance, asking, in the alternative, for rescission of the contract and return of his deposit. He is not to lie by until the position of all parties is altered, and then, when the reversion falls in, to come and say 'Give me the fund'" (*per* Lindley, M.R., in *Levy* v. *Stogdon*, [1899] 1 Ch. at p. 10). But a purchaser's delay may be excused if he has, to the vendor's knowledge, been in possession under the contract (*Mills* v. *Haywood*, *ubi supra*).

Where time is of the essence of a contract, either expressly by virtue of a stipulation to that effect, or impliedly, by reason of the nature of the subject-matter (*e.g.* a public-house sold as a going concern, *Tadcaster Tower Brewery Co.* v. *Wilson*, [1897] 1 Ch. at p. 711), or of the surrounding circumstances (*Tilley* v. *Thomas*, 1867, L. R. 3 Ch. at p. 67), non-observance of such time is generally fatal; and though the time for completion may originally not have been essential, one party may, after improper

delay by the other party, make it essential, by notice fixing a reasonable time within which the contract must be completed (*Green* v. *Sevin*, 1879, 13 Ch. D. 589, and cases there cited).

On the other hand, though the case be one of a class in which the time for completion is usually essential, a condition for payment of interest in the event of non-completion at the specified date may operate to show that time was not of the essence (*Webb* v. *Hughes*, 1870, L. R. 10 Eq. 281).

Fraud.—A contract will not be specifically enforced against a defendant who establishes that his entering into it was procured, or occasioned, by some fraud on the part of the plaintiff, or his agent; but whether the fraudulent act of a stranger can ever operate to deprive an innocent vendor of his right to enforce a contract, *quære* (*Union Bank* v. *Munster*, 1887, 37 Ch. D. at pp. 53—55).

Fraud is infinite in variety (*Reddaway* v. *Banham*, [1896] App. Cas. at p. 221). In some cases—where, for instance, the nature of the contract is, or the antecedent fiduciary relations of the parties have been, such as to make full disclosure of all material facts a duty—even silence may amount to fraud (*Brownlie* v. *Campbell*, 1880, 5 App. Cas. at pp. 950, 954); though

"silence is innocent and safe, where there is no duty to speak" (*Chadwick* v. *Manning*, [1896] App. Cas. at p. 238; cp. *Turner* v. *Green*, [1895] 2 Ch. at p. 209). But, of course, if the defendant, on discovering the fraud, elects to abide by the contract, he cannot afterwards plead the fraud as a defence to an action for specific performance. And, again, a party to a contract which is divisible into two parts will not be allowed to evade performance of his clear obligations under one part of the contract, by setting up his own fraudulent collusion with the other party's agent in connection with the other part (*Odessa Tramways Co.* v. *Mendel*, 1878, 8 Ch. D. 235, 244).

That the specific enforcement of an alleged contract would involve a fraud on the public was, in a modern case (*Post* v. *March*, 1880, 16 Ch. D. 395), held to be a good ground for defence. And it may here be noted that the Statute of Frauds does not prevent the proof of a fraud (*Rochefoucauld* v. *Boustead*, [1897] 1 Ch. at p. 206).

Hardship.—The Court, in the exercise of its judicial discretion, is averse from enforcing a hard bargain, even where no impropriety of conduct is imputable to the party suing (*Falcke* v. *Gray*, 1859, 4 Drew. at p. 659; and see, for

instance, *Wedgwood* v. *Adams*, 1843, 6 Beav. 600; also *Preston* v. *Luck*, 1884, 27 Ch. D. at p. 506).

But, in considering the question of hardship, the time when the contract was entered into is the material time; and subsequent events cannot, usually, be relied upon as raising a defence on this ground. Nor will the defence avail, where the hardship has arisen, or may arise, through the defendant's own default (*Pembroke* v. *Thorpe*, 1740, 3 Swans. 443, n.) or act (*e.g. Helling* v. *Lumley*, 1858, 3 De G. & J. Ch. at p. 498), or by reason of his having made a speculative purchase of property which turns out to be worthless (*e.g. Haywood* v. *Cope*, 1858, 25 Beav. at p. 150).

Again, as a general rule, inadequacy of price, unless so striking as to amount to conclusive evidence of fraud, is not in itself a sufficient ground for refusing a specific performance (*Coles* v. *Trecothick*, 1804, 9 Ves. Jun. at p. 246); and there appears to be now (*i.e.* since the Sales of Reversions Act, 1867) no reason for excepting contracts for the sale of reversionary interests from the operation of this rule; though the last-mentioned statute has not otherwise affected the Court's jurisdiction to give relief against unconscionable bargains (see *e.g. Fry* v.

Lane, 1888, 40 Ch. D. 312); and, for a review of the cases on this topic, see the judgments of the Irish Court of Appeal in *Rae* v. *Joyce*, 1892, 29 L. R. Ir. 500.

Illegality.—Upon grounds of public policy, the Court declines to enforce illegal contracts (*Sykes* v. *Beadon*, 1879, 11 Ch. D. at pp. 193—197); as where, for instance, the consideration is an agreement to stifle a prosecution (*Windhill Local Board of Health* v. *Vint*, 1890, 45 Ch. D. 351; *Jones* v. *Merionethshire, &c. Society*, [1892] 1 Ch. at p. 188), or even where the transaction savours of champerty (*De Hoghton* v. *Money*, 1866, L. R. 2 Ch. at p. 169), or where the contract, having originally been legal, has become illegal by virtue of some subsequent statute (*Atkinson* v. *Ritchie*, 1809, 10 East, at p. 534; 10 R. R. at p. 374).

Again, a trade union being, apart from the Trade Union Act, 1872, an illegal association, the Court will not directly enforce an agreement between its members for providing benefits to members (*Rigby* v. *Connol*, 1880, 14 Ch. D. 482); but in some cases it may, by means of an injunction, indirectly enforce such an agreement (*Wolfe* v. *Matthews*, 1882, 21 Ch. D. at p. 196).

The Court, however, looks with great disfavour on the objection of illegality, when urged

by a party to a contract who has received the consideration for which he contracted (*Shrewsbury, &c. Rail. Co.* v. *London and North-Western Rail. Co.*, 1853, 16 Beav. at p. 451).

Impossibility.—"In bills for specific performance," said Lord Hardwicke in *Green* v. *Smith* (1738, 1 Atk. at p. 573), "this Court never gives relief where the act is impossible to be done"; but it must always be borne in mind that, though specific performance be impossible, a defendant may be liable in damages.

The impossibility of performance may occur, or arise, in a variety of ways,—by reason, for instance, of the destruction or extinction of the subject-matter of a contract; or, in the case of a contract to allot shares, by reason of all the shares in the company having been allotted, to persons other than the person seeking performance, before the commencement of the action (*Ferguson* v. *Wilson*, 1866, L. R. 2 Ch. at pp. 86, 87); or from a change in the political relations of a contracting party's country (*Atkinson* v. *Ritchie*, 1809, 10 East, at p. 535; 10 R. R. at p. 374); or from the refusal of a third person to give some necessary licence or consent (*Weatherall* v. *Geering*, 1806, 12 Ves. Jun. at p. 511; *Bermingham* v. *Sheridan*, 1864, 33 Beav. 660); or from there not being

time enough for one party to do works which, by the terms of the contract, were to be done within a specified time (*Asylum for Female Orphans* v. *Waterlow*, 1868, 16 W. R. 1102); or from the intended term of a lease having expired before trial of an action for enforcing an agreement for the lease (*Walters* v. *Northern Coal Mining Co.*, 1855, 5 De G. M. & G. Ch. at p. 639); or from a plaintiff's lack of power to perform his part of the contract (*e.g. Sheffield Corporation* v. *Sheffield Electric Light Co.*, [1898] 1 Ch. 203).

Where, however, the meaning of a contract is, that one party shall do a certain thing, but may, at his option, do it in either of two modes, and one of those modes becomes impossible by the act of God, he is bound to perform it in the other mode, which is possible (*Barkworth* v. *Young*, 1856, 1 Drew. at p. 25). *A fortiori* if, at the time of the contract, one of the alternatives is impossible, the other, being possible, must be performed.

Incapacity.—It may be a ground of defence that the party sued was, at the time of the contract, under some personal or particular incapacity which operated to prevent the contract from binding him.

Thus an infant is, generally, incapable of

entering into a binding contract (*King* v. *Bellord*, 1863, 1 Hem. & M. at p. 347); so is a married woman acting alone, as regards property which is not her separate property, or subject to a power of appointment by deed vested in her (*Cahill* v. *Cahill*, 1883, 8 App. Cas. at p. 428; *Martin* v. *Mitchell*, 1820, 2 Jac. & W. at pp. 424, 425), except that she can bindingly contract with her husband for a compromise of legal proceedings between them (*McGregor* v. *McGregor*, 1888, 21 Q. B. D. at p. 430); so, again, is a person of unsound mind, provided the plaintiff at the time of the contract knew of the unsoundness (*Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 509; but distinguish *In re Pagani*, [1892] 1 Ch. at p. 238); so, where the defendant was, to the plaintiff's knowledge, in a state of intoxication at the time of the contract (*Cooke* v. *Clayworth*, 1811, 18 Ves. Jun. at p. 15; but distinguish *Shaw* v. *Thackray*, 1853, 1 Sm. & G. at p. 539); and so, where the defendant is under disability to sell (otherwise than under the Lands Clauses Acts), as being an ecclesiastical corporation (*Wycombe Rail. Co.* v. *Donnington Hospital*, 1866, L. R. 1 Ch. at p. 273).

Incompleteness.—A defendant may defend himself by showing that, at the time of the

issue of the writ, the contract or (if the case is one in which writing is requisite) the written evidence of it was incomplete, in the sense of being defective in respect of some term which is essential (see above, pp. 29, 30) or material, and cannot be supplied either by ordinary legal implication, or by some means indicated in the contract itself. Where a contract is, on the face of it, incomplete until something else has been done, whether by further agreement between the parties, or by the decision of an arbitrator, the Court is powerless, because there is no complete contract to enforce (*Hart* v. *Hart*, 1881, 18 Ch. D. at p. 689). But the defence may fail if, the defect being curable, it is owing to the defendant's own default that it has not been cured (see *Pritchard* v. *Ovey*, 1820, 1 Jac. & W. at pp. 403, 404, and *Smith* v. *Peters*, 1875, L. R. 20 Eq. at p. 513).

Again, a contract alleged and sued upon by a plaintiff may be incomplete, in the sense that it never passed out of the stage of negotiation, or, for one reason or another, never became a completely concluded contract. This ground of defence has very often been taken in cases of contracts alleged to have been constituted by offer and acceptance.

The rule of the Court is, that whoever brings

forward a contract, as constituted of a proposal on one side and an acceptance on the other, must show that the acceptance was prompt, immediately given, unqualified, simple, and unconditional (*Oriental Inland Steam Co.* v. *Briggs*, 1861, 4 De G. F. & J. Ch. at p. 197); and, further, that it was communicated to the proposer within a reasonable time (*Williams* v. *Williams*, 1853, 17 Beav. at p. 216), and before any withdrawal of the proposal had been brought to the knowledge of the person to whom it was made (*Henthorn* v. *Fraser*, [1892] 2 Ch. at p. 31, a case noticeable as illustrating a difference between acceptance and withdrawal *by post*). A common instance of such a contract is an application for shares in a company, followed by allotment and notice of it to the applicant (see *Nicol's Case*, 1885, 29 Ch. D. at p. 426).

In accordance with the foregoing rule, if a fresh term is introduced into the acceptance of an offer, a binding contract is not concluded by the acceptance (*Kennedy* v. *Lee*, 1817, 3 Mer. at p. 454). But, of course, expressions which, in the view of the Court, fall short of adding a fresh term do not affect the enforceability of what, apart from them, is a complete concluded contract (*e.g. Simpson* v. *Hughes*, 1897, 45

W. R. 221). With respect to concluded contracts, see further, *supra*, pp. 27—29.

Infancy—Lunacy. See *Incapacity, supra*, pp. 108, 109.

Misrepresentation. — A false representation, knowingly made by a party, or his agent, in order to induce a contract, is fraud (*q.v. supra*, p. 103). But, apart from fraud, the circumstance that a party to a contract, or his agent (*Mullens* v. *Miller*, 1882, 22 Ch. D. at p. 199), made carelessly, or even quite innocently, some material misrepresentation, which was in fact relied upon by the other party, and was an inducement to the contract, will generally afford to that other party a good defence in an action for specific performance. Indeed, where the contract has been induced by a material misrepresentation of fact made by a party or his agent, the other party not only can successfully resist an action for specific performance, but also is entitled to maintain an action, or a counterclaim, for rescission, even though the misrepresentation was not made fraudulently (*Wauton* v. *Coppard*, [1899] 1 Ch. at pp. 97, 98).

It is no answer to a defence on this ground that the defendant was offered, or possessed, means of testing the truth of the representation complained of, if he did not avail himself of

those means (*Aaron's Reefs* v. *Twiss*, [1896] App. Cas. at p. 279); but it may be an answer, if he used such means (*Attwood* v. *Small*, 1838, 6 Cl. & Fin. 232). And the defence is untenable if the defendant all along knew the truth of the matter (*e.g. Nene Valley, &c. Commissioners* v. *Dunkley*, 1876, 4 Ch. D. at p. 4; *Dyer* v. *Hargrave*, 1805, 10 Ves. Jun. at p. 509); for, in such a case, he cannot have been misled by the representation, and there is no room for drawing the inference of fact (*Smith* v. *Chadwick*, 1884, 9 App. Cas. at p. 196) that he relied upon it.

"It is quite true," said North, J., pithily in *Archer* v. *Stone* (1898, 58 L. T. N. S. at p. 35), "that a man may with impunity tell a lie in gross, in the course of negotiations for a contract. But he cannot, in my opinion, tell a lie appurtenant. That is to say, if he tells a lie relating to any part of the contract or its subject-matter, which induces another person to contract to deal with his property in a way which he would not do if he knew the truth, the man who tells the lie cannot enforce the contract."

And even silence may amount to a misrepresentation disentitling a plaintiff to performance. If, for instance, a purchaser of leasehold

property tells the vendor the object which he has in purchasing, and the vendor remains silent as to a covenant in the lease prohibiting or interfering with that object, his silence is equivalent to an untrue representation that there is no such covenant (*Power* v. *Barrett*, 1887, 19 L. R. Ir. at p. 487).

Further, a misrepresentation may be made by conduct (*Andrew* v. *Aitken*, 1883, 31 W. R. 425), as well as by words; but mere general statements, advertising flourishes, have often been held not to amount to misrepresentation substantial enough to excuse a defendant from performance (*e.g. Dimmock* v. *Hallett*, 1866, L. R. 2 Ch. at p. 27).

In a recent Irish case, in which a misrepresentation had been innocently made by the vendor's agents with respect to the acreage of the property sold, and the purchaser had, in consequence of the misrepresentation, agreed to pay a price calculated on the basis of the supposed acreage, it was held that the purchaser was entitled to have specific performance by the vendor to the extent of the real acreage, with a deduction from the purchase-money proportionate to the deficiency (67 acres out of 442) (*Connor* v. *Potts*, [1897] 1 I. R. 534, and esp. 539).

Mistake.—Contract is *consensus ad idem*, and where a contract has been founded upon a common mistake of both parties with regard to some material matter, that is a ground of defence to an action for specific performance (*e.g. Cochrane* v. *Willis*, 1865, L. R. 1 Ch. 58).

Further, a mistake induced, or contributed to, by the plaintiff, or his agent, may afford a good defence (*e.g. Denny* v. *Hancock*, 1870, L. R. 6 Ch. 1); and so may even a mistake on the part of the defendant, or his agent, only (*e.g. Malins* v. *Freeman*, 1837, 2 Keen, at p. 34; and see *Stewart* v. *Kennedy*, 1890, 15 App. Cas. at p. 105). But where there has been no misrepresentation, and no ambiguity in the terms of a contract, a defendant will not, generally, be allowed to evade performance by simply stating that he has made a mistake (*Tamplin* v. *James*, 1880, 15 Ch. D. at p. 217; see, too, *Dyas* v. *Stafford*, 1881, 7 L. R. Ir. at p. 606).

As to mistake concerning the person contracted with, see *Smith* v. *Wheatcroft*, 1878, 9 Ch. D. 223; and compare *Nash* v. *Dix*, 1898, 58 L. T. N. S. at pp. 448, 449.

Mistakes of law, as well as mistakes of fact, may afford a defence (*Allcard* v. *Walker*, [1896] 2 Ch. at p. 381, and cases there cited). And if the mistake consists in the omission, from a

written memorandum of agreement, of something which was verbally agreed upon, the defendant may prove the omission by parol evidence, and will not be compelled to perform the contract except with the omitted term included (*Joynes* v. *Statham*, 1746, 3 Atk. 388).

It is, however, to be borne in mind that, where a contract has been reduced to writing, one party's mistaken belief, not induced by the other party, in regard to the nature of the obligations which he has, according to the true construction of the instrument, undertaken, will not, generally, suffice to enable the mistaken party to escape from performance; for every person who becomes a party to a written contract, contracts to be bound, in case of dispute, by the interpretation which a Court of law may put upon the language of the instrument (*Stewart* v. *Kennedy*, No. 2, 1890, 15 App. Cas. 108, and at pp. 121—123; see, however, *per* Cotton, L.J., in *Preston* v. *Luck*, 1884, 27 Ch. D. at p. 506).

Mutuality.—If at the time when the contract was made—which is the crucial time for this purpose—it was not mutual, that is to say, was such that, though enforceable against one of the parties, it was not enforceable against the other, that circumstance is generally a good defence. In order that the Court may inter-

fere there must be mutual rights capable of being enforced by the Court" (*per* Lord Cranworth in *Blackett* v. *Bates*, 1865, L. R. 1 Ch. at p. 125).

A defendant, for instance, may successfully resist performance at the suit of an infant, because he could not have enforced performance against the infant (*Flight* v. *Bolland*, 1828, 4 Russ. at p. 301); so, also, where the plaintiff at the time of the contract had no title (*Hoggart* v. *Scott*, 1830, 1 Russ. & M. at p. 295). But a defendant will not be held excused where he has so conducted himself as to waive this objection (*Hoggart* v. *Scott*, *ubi supra*); or, it is conceived, where it is owing to his own default that a contract, originally mutual, has become unenforceable by him; or where he has, but the plaintiff has not, signed a written contract falling within the Statute of Frauds, for, in this case, the plaintiff, by suing, has made the contract mutual (*Flight* v. *Bolland*, *ubi supra*); or where a defendant, having contracted to sell substantially more than he is able to convey, is sued for specific performance with compensation, although here he could not have enforced the contract against the purchaser (see pp. 57—61, *supra*).

A contract, originally one-sided, may have

become mutual; as where A. has contracted to sell property, or to renew a lease of it, to B., upon request within some limited period by B., and the request has been duly made. Here, of course, no defence can be maintained on the ground of the original absence of mutuality. For when, for instance, a lessee, who has an option of renewal, has duly served a proper notice requiring the lessor to renew, there is a contract between the parties for grant and acceptance of a renewed lease, from which neither party can recede without the other's consent, and which is specifically enforceable by either of them (*Dawson* v. *Lepper*, 1892, 29 L. R. Ir. at p. 216).

Rescission.—If the defendant can show that the contract has been effectually rescinded, that is, of course, a good defence to an action for specific performance of it.

Such rescission may have been brought about in a variety of ways. The parties may simply have agreed with one another, either in writing or (notwithstanding that the contract was one required by law to be expressed in writing) by parol (*Davis* v. *Symonds*, 1787, 1 Cox, at p. 406; 1 R. R. at p. 67), to rescind. Or, without expressly agreeing to rescind their original contract, they may have come to some fresh

agreement which is so inconsistent with the original contract as, in effect, to abrogate it. Or there may have been, on the part of the plaintiff, such a waiver or abandonment, either by words or by conduct, of his rights under the contract, as to dispense the defendant from performance, on his clearly proving the waiver or abandonment (*Carolan* v. *Brabazon*, 1846, 3 Jo. & Lat. at pp. 209, 210; *Moore* v. *Crofton*, 1846, *ibid.* at pp. 445, 446). Or, again, as commonly happens in cases of sales on the Stock Exchange, the original contract may have been put an end to by the substitution for it of a binding contract between the seller and a nominee of the original buyer. Or the defendant may have exercised, reasonably and in good faith, a power of rescission reserved to him by the contract (*In re Starr-Bowkett Building Society, &c.*, 1889, 42 Ch. D. 375; *Smith* v. *Wallace*, [1895] 1 Ch. 385; distinguish *In re Deighton and Harris' Contract*, [1898] 1 Ch. 458). Or he may have rescinded on the strength of some circumstance which the Court recognises as entitling a party to a contract to annul it, fraud, for instance, or absolute refusal to perform, or unreasonable delay, on the part of the other party.

If a vendor of land, being by the contract

bound to make out a marketable title, refuses to discharge that obligation, the purchaser may elect to treat such refusal as a breach, releasing him from the contract as if it had been rescinded, even though the time for completion may not have arrived (*Maconchy* v. *Clayton*, [1898] 1 I. R. 291).

Statute of Frauds.—Non-compliance with the requirements of this statute is a very common ground of defence. This topic has already been discussed (*supra*, pp. 23 *et seq.*).

Time.—The cases in which lapse of time, or, in particular, the non-observance of some stipulation in the contract with respect to time, furnishes a ground of defence, have been adverted to under the head ***Delay*** (*supra*, p. 101).

Title.—It may be a ground of defence that the plaintiff, being vendor, cannot make such a title as the purchaser is entitled, in accordance with the contract, to require. An objection of this kind is sometimes adjudicated upon at the trial (*e.g. Bates* v. *Kesterton*, [1896] 1 Ch. 159), but oftener in the proceedings upon an inquiry as to title (*infra*, p. 144), or at the hearing of a summons under the Vendor and Purchaser Act, 1874.

On a contract of sale, the obligations of the vendor as regards title depend partly upon the

nature of the subject-matter, and partly upon the terms, express or implied, of the contract.

In the case of an ordinary open contract for sale of freehold land, the vendor's obligations are, in their main outlines, well settled. It is incumbent on him (i) to make out a good forty years' title to the fee simple, free from incumbrances; and also (ii) to pay the outgoings of the property (retaining the rents), and to take reasonable care of it,—not only not wilfully damaging it, but not wilfully allowing it to become deteriorated (*Lysaght* v. *Edwards*, 1876, 2 Ch. D. at p. 507)—during the interval between contract and completion or previous acceptance of possession by the purchaser; and (iii) on payment of the purchase-money, to execute and procure the execution by all other necessary parties (if any) of a proper deed for conveying the property to the purchaser. And so if, at the date of the contract, the property is in the occupation of a tenant, the purchaser being, generally speaking, entitled to have it preserved pending completion in its existing state, the vendor is not entitled, against the purchaser's wish, to determine the tenancy, and if he does so determine it, he becomes liable to the purchaser for any loss thereby

accruing to him (*Raffety* v. *Schofield*, [1897] 1 Ch. at pp. 944, 945).

Similarly, in the simple case of an open contract for sale of a leasehold house, held for a term of years under a lease, containing usual lessee's covenants and a proviso for re-entry on breach of any of them, the vendor is, it is conceived, bound, except in so far as he is relieved from obligation by statutory rules (Vendor and Purchaser Act, 1874, s. 2; Conveyancing, &c. Act, 1881, s. 3), not only to show that the lease is a valid one, but also to keep it unimpeached (and therefore to go on performing the lessee's covenants) until completion or transfer of possession, and to prove, if required, due performance of covenants up to that time.

It is true that, by the statutory rule applicable to such a case (Conv. Act, 1881, s. 3 (4)), the lease is to be assumed to have been duly granted *unless the contrary appears*, and that production of the last receipt for rent is sufficient evidence of the due performance of the covenants *unless the contrary appears*. But, if the purchaser can make it appear that in fact the lease was not duly granted, or that any of the covenants—a repairing covenant, for instance—have in fact not been duly performed,

that will, it is conceived, provided he has not clearly waived the objection, be a good defence to an action by the vendor for specific performance (see sub-s. (11) of s. 3 of Conv. Act, 1881; also *In re Higgins and Percival*, 1888, 57 L. J. Ch. at p. 808; and *Palmer* v. *Green*, 1856, 25 L. J. Ch. at p. 842).

The exercise of a right of re-entry or forfeiture may be postponed, or averted, by or under s. 14 of the Conveyancing, &c. Act, 1881, but such rights are not abrogated by that enactment; and it is conceived that, notwithstanding it, a vendor of leasehold property cannot enforce specific performance of a contract to sell it, while his title is impeachable on the score of some unwaived breach of covenant (cf. at Common Law, *Penniall* v. *Harborne*, 1848, 11 Q. B. 368; and *Wilson* v. *Wilson*, 1854, 14 C. B. 616). Section 14 does not prevent neglect to comply with a covenant from being a breach of the covenant (*per* Lord Esher, M.R., in *Coatsworth* v. *Johnson*, 1886, 55 L. J. Q. B. at p. 222).

In connection with the topic just discussed, it is to be remembered that the common form of conveyance of leasehold property by a vendor "as beneficial owner" contains an implied covenant, on his part, that all the lessee's cove-

nants have been performed up to the time of conveyance (Conv. Act, 1881, s. 7 (B.)), and that a purchaser is, generally, entitled to sue in respect of a breach of covenant for title which comes within the literal terms of that covenant, even though he took his conveyance with notice of the defect (*Page* v. *Midland Rail. Co.*, [1894] 1 Ch. at pp. 20, 24).

Generally, if a vendor can make a good title at any time before the day fixed for completion of the contract, it will be enforced; but if he has no title in himself, he will not be allowed to insist on the purchaser accepting the title of some third person who can make a good title (*In re Bryant, &c.*, 1889, 44 Ch. D. at pp. 233, 234).

In some cases, the defence will succeed if it is shown that the title is doubtful, in regard to some question of law or of fact (*Alexander* v. *Mills*, 1870, L. R. 6 Ch. at p. 131; *Mogridge* v. *Clapp*, [1892] 3 Ch. at p. 392; *In re Scott, &c.*, [1895] 1 Ch. at pp. 603, 604, cp. p. 609); but as regards general matters of law, including the construction of general Acts of Parliament, the Court, nowadays, usually solves the doubt by deciding the question (*In re Thackwray, &c.*, 1888, 40 Ch. D. at pp. 38, 39).

A purchaser is not justified in repudiating a

contract without investigation of the title, merely because he finds that one link in it is a voluntary conveyance executed before the Voluntary Conveyances Act, 1893 (*Noyes* v. *Paterson*, [1894] 3 Ch. 267).

Ultra Vires.—It may be a good defence that the contract sued on is one which it was beyond the powers of a defendant corporation, or of its officers, to make (see *Ashbury Rail. &c. Co.* v. *Riche*, 1875, L. R. 7 H. L. 653; *Earl of Shrewsbury* v. *North Staffordshire Rail. Co.*, 1865, L. R. 1 Eq. at p. 617).

A contract may, however, though *ultra vires* the directors of a company, be one which the company is competent to adopt, and if it be adopted by ratification or acquiescence on the company's part, it becomes enforceable against the company. A stranger contracting in good faith with a corporation is entitled to assume that whatever ought, according to its regulations, to have been done, in order to put it into a position to contract with him, was duly done (*Royal British Bank* v. *Turquand*, 1856, 6 El. & Bl. 327). And in a case where a railway company had statutory power to buy land for extraordinary purposes, it was held that an honest vendor of land to the company was not bound to see that the land was strictly required

for such purposes, and a defence on the ground of *ultra vires* failed (*Eastern Counties Rail. Co.* v. *Hawkes*, 1855, 5 Cl. H. L. 331).

Again, where a transaction, taking it in its entirety, would be bad, but the agent of one of the parties to it has colluded with the other party for the purpose of putting the agreement in such a form that the valid part shall be separated from the invalid part, then that which is *intra vires* may be separated from that which is *ultra vires:* in other words, that which is honest and true may be separated from that which is dishonest and false, and the principal of the agent who has been party to the fraud may say to the other party, whom he sues, "You have agreed that that which was originally commenced as one negotiation shall result in two separate agreements, and, you having so agreed, I will now take you at your word, and I will enforce so much of the agreement as is contained in the valid separate document upon which I sue, and I will leave the other part of the agreement alone" (*per* Fry, J., in *Odessa Tramways Co.* v. *Mendel*, 1878, 8 Ch. D. at p. 243).

Uncertainty.—A contract must, in order that it may be specifically enforced, be certain and

definite (*Lord Walpole* v. *Lord Orford*, 1797, 3 Ves. Jun. at p. 420).

Accordingly, uncertainty, indefiniteness, vagueness, or obscurity as to the terms or extent of a contract may afford a ground of defence. For typical examples of this, reference may be made to *Harnett* v. *Yielding* (1805, 2 Sch. & Lef. 549; 9 R. R. 98); *Lord James Stuart* v. *L. & N. W. Rail. Co.* (1852, 1 De G. M. & G. Ch. at p. 735); *Taylor* v. *Portington* (1855, 7 De G. M. & G. Ch. 328); *Rummens* v. *Robins* (1865, 3 De G. J. & S. Ch. 88); and *Pearce* v. *Watts* (1875, L. R. 20 Eq. 492).

But the conduct of the parties after the contract may displace an objection which might originally have been raised on this score; and the Court will be slow to give effect to such a defence where there has been fraud on the part of the defendant, or part performance (*Oxford* v. *Provand*, L. R. 2 P. C. 135; *Chattock* v. *Miller*, 1878, 8 Ch. D. at p. 181). "I think," said Kay, J., in *Hart* v. *Hart* (1881, 18 Ch. D. at p. 685) . . . "Lord Justice Turner went as far as this: It is the duty of the Court, as far as it is possible to do so, to ascertain the terms of the agreement, and to give effect to it. That is, as I understand, the rule of Equity, that although there may be consider-

able vagueness in the terms, and although it may be such an agreement as the Court would hesitate to decree specific performance of, if there had not been part performance, yet, when there has been part performance, the Court is bound to struggle against the difficulty arising from the vagueness."

CHAPTER XV.

EVIDENCE—PAROL VARIATION.

It has already been noticed (*supra*, pp. 33, 36 *et seq.*) that there are certain cases of contract in which, although the Statute of Frauds requires written evidence of the terms of the contract, the Court allows them to be proved by parol; also that parol evidence may be admissible for identification of documents (*supra*, p. 27), or the subject-matter of contract (*supra*, p. 31); and that it is permissible to prove by parol evidence the abandonment of a written contract (*supra*, pp. 118, 119; see, too, *Price* v. *Dyer*, 1810–11, 17 Ves. Jun. at pp. 363, 364). It is now proposed to advert briefly to another and important category of cases, in which, the contract sued on being in writing, it is sought by one of the parties to an action for specific performance to set up a parol variation of the written contract.

Parol Variation.—Independently of the Statute of Frauds, it is a rule of the Common Law that parol evidence cannot be received to contradict a written contract. But Courts of Equity have

long held that, when the exercise of their discretionary jurisdiction in specific performance is invoked, a defendant may adduce parol evidence to show that by fraud, mistake, or surprise the writing sued upon does not correctly or completely express the real bargain (see *Joynes* v. *Statham*, 1746, 3 Atk. 387; *Rambottom* v. *Gosden*, 1812, 1 Ves. & Bea. at p. 168; *Clowes* v. *Higginson*, 1814, *ibid.* at pp. 526, 527; also *ibid.* at p. 378).

Cases in which the defence is that there was something by parol, which is of the essence of the contract but not expressed in the writing, differ, of course, from those in which the defendant's point is that, though there is a clear contract in writing, it ought not to be performed because of some collateral circumstances which show, fraud, mistake, or surprise. Both grounds of defence, however, may legitimately be matters for parol evidence (*Dear* v. *Verity*, 1869, 17 W. R. at pp. 568, 569).

Where the effect of the parol evidence is to show that the parties were at cross-purposes, the Court declines to interfere (*Clowes* v. *Higginson*, *ubi supra*, at p. 535); but where it shows that the parties were at one, but that some material item of their parol contract has been omitted from the written memorandum of it,

there the Court will, at the defendant's request, enforce performance of the written contract with the parol variation (see *Fife* v. *Clayton*, 1807, 13 Ves. Jun. 546). And where the plaintiff submits to perform the omitted term, he may obtain similar relief (*Martin* v. *Pycroft*, 1852, 2 De G. M. & G. Ch. 785; cp. *Robinson* v. *Page*, 1826, 3 Russ. 114, 121, and *Smith* v. *Wheatcroft*, 1878, 9 Ch. D. 223). It depends, in fine, on the particular circumstances of each case, whether a parol variation set up by a defendant will defeat the plaintiff's right to performance, or whether the Court will perform the contract, taking care that the subject-matter of the parol agreement is also carried into effect (*London, &c. Rail. Co.* v. *Winter*, 1840, Cr. & Ph. at p. 62).

Sometimes the Court allows the plaintiff to elect between having his action dismissed, and having judgment for performance with the variation (*e.g. Rambottom* v. *Gosden*, *supra*, p. 130). It must, however, be borne in mind that if, subsequently to a written contract falling within the scope of the Statute of Frauds, the parties have verbally agreed to vary it, but the variations have not been acted upon, neither party can escape from performance of the written contract by reason only of the parol variations;

for to allow parol evidence of such variations to be given would be directly contrary to the statute (see *Price* v. *Dyer*, 1810–11, 17 Ves. Jun. at p. 365; and *Snelling* v. *Thomas*, 1874, L. R. 17 Eq. 303). Lord St. Leonards' view of the result of the authorities as to parol variation is stated in Sugden, Vendors and Purchasers, 14th ed. at p. 165).

In the Court of Chancery, a curious distinction appears to have been made by some eminent judges, who held that, although the defendant to a suit for specific performance of a written contract might adduce parol evidence in variation of the contract, the plaintiff in such a suit could not, at any rate where there had been no part performance, go into parol evidence for the purpose of enforcing the contract with a variation (*Woollam* v. *Hearn*, 1802, 7 Ves. Jun. 211 b; 2 W. & T. Eq. Cas. 7th ed. 513; *Marquis Townshend* v. *Stangroom*, 1801, 6 Ves. Jun. 328). But on the coming into operation of sect. 24, sub-sect. 7, of the Judicature Act, 1873, such a distinction became untenable; and it has accordingly been held that, where the Statute of Frauds does not create a bar, a plaintiff may, in one and the same action, obtain, upon parol evidence of mistake, rectification of a written contract,

and specific performance of the contract as rectified (*Olley* v. *Fisher*, 1886, 34 Ch. D. 367).

It may here be added that, where an alleged contract in writing is sued on, it is open to the defendant to show by parol evidence that, notwithstanding the writing, there was no contract (*Pattle* v. *Hornibrook*, [1897] 1 Ch. 25).

CHAPTER XVI.

JUDGMENT—DEPOSIT—INTEREST AND RENTS.

Judgment.—If, at the trial, the plaintiff succeeds, the form of the judgment varies, of course, according to the subject-matter of the contract sued on, and to the position under it of the party suing relatively to the party sued (see *North* v. *Percival*, [1898] 2 Ch. at p. 134). A variety of forms of judgment is collected in Seton, 5th ed. pp. 1832 *et seq.*

In a simple case of a contract for sale of land, where the title has not been accepted, admitted, or established at or before the trial, the judgment, if the vendor is plaintiff, begins with a declaration and order that the contract ought to be specifically performed *in case a good title can be made to the property comprised in it*, and goes on to refer the action to the chambers of the judge for inquiry as to whether a good title can be made, and, if so, when it was first shown that such a title could be made, and adjourns the further consideration of the action until after the Master's certificate of the result of the inquiry. If, in such a case, the purchaser is

plaintiff, the form of judgment will be the same, except that the words italicised above will be omitted.

Very often the title is accepted, admitted (by default in pleading or otherwise), or established, before or at the trial. In such a case, of course, no inquiry as to title is requisite; the judgment provides for the ascertainment of the amounts for which the vendor is accountable in respect of rents, the purchaser in respect of interest on unpaid purchase-money, and the unsuccessful party in respect of costs of action, and directs the vendor to convey the property to the purchaser, against payment by the latter of the total amount due from him, after adjustment and set-off of the several amounts for which the parties respectively are accountable to one another in respect of purchase-money, rents, interest, and costs.

Where a purchaser has accepted and approved a title, all the facts being known to him at that time, he cannot afterwards resist a judgment for specific performance, and claim to have the title investigated in the chambers of the judge, on the suggestion of some objection to the title which he might have taken before he accepted it (*Soper* v. *Arnold*, 1889, 14 App. Cas. at pp. 434, 436).

The judgment at the trial may, in a suitable case, contain a declaration of the vendor's lien on the property sold for unpaid purchase-money, interest, and costs, and a reservation to him of liberty to apply to the Court to enforce the lien; or an inquiry as to, or assessment of, damages sustained by the plaintiff by reason of the defendant not having performed the contract; or provisions for compensation being given, or an abatement of the purchase-money being made, in respect of defect of title or deficiency of estate.

In a purchaser's action, an inquiry as to rents, for which the vendor is accountable, on the footing of wilful default cannot be directed against the vendor as of course, and in the absence of special circumstances; but it may be, and ought to be, directed, if special circumstances leading up to it are shown at the trial to exist (*Malone* v. *Henshaw*, 1891, 29 L. R. Ir. at p. 358).

Where the contract sued on is an agreement for a lease, the judgment usually directs the parties to execute respectively a lease and counter-part lease of the property according to the agreement: where it is a contract for transfer of shares, it is by the judgment ordered that the vendor and all proper parties execute a

deed of transfer of the shares to the purchaser, and that the latter concur in all necessary and proper steps for causing the shares to be duly registered in his name; and the purchaser is declared liable to indemnify the vendor against calls.

If the action has been registered as a *lis pendens*, and is, at the trial, dismissed, the judgment may include an order vacating the registration (*Baxter* v. *Middleton*, [1898] 1 Ch. 313). And where a vendor plaintiff has received a deposit, and his action is dismissed with costs, the purchaser may (provided he has counterclaimed for it) obtain judgment for return of his deposit, with interest, and also a declaration giving him a lien on the vendor's interest in the subject-matter of the contract for the amount of the deposit, interest, and costs (see *Levy* v. *Stogdon*, [1898] 1 Ch. at p. 485).

As to costs:—when exercising the essentially discretionary jurisdiction in specific performance, the Court has always dealt at discretion with the costs of proceedings invoking that jurisdiction, with the object of doing the completest possible justice in each particular case; and this discretion is amply confirmed to the Supreme Court by the present rules of procedure (see Judicature Act, 1890, s. 5, and

Ord. LXV.). It would, therefore, be of little practical use to attempt a classification of the very numerous reported authorities illustrating this topic. Many of them are collected in Seton (5th ed.) at pp. 1875, 1876, and in Morgan and Wurtzburg on Costs in the Chancery Division, pp. 250—264. There is, however, a pronouncement by Fitzgibbon, L.J., which is of such common applicability that it may usefully, perhaps, be quoted. "As to costs," he said (in *Dyas* v. *Stafford*, 1882, 9 L. R. Ir. at p. 529), "I disapprove of any suggestion that a defendant who succeeds upon a plea of the Statute of Frauds is an unmeritorious litigant, and that he is only reluctantly to be allowed his costs." (See also *infra*, p. 148.)

Deposit.—Payment by the purchaser of a deposit takes place almost invariably on sales by public auction, and sometimes on sales by private contract. The deposit, in such cases, serves two purposes; if the purchase is carried out, it goes in part payment of the purchase-money; but its primary purpose is to serve as a guarantee that the purchaser means business (*Soper* v. *Arnold*, 1889, 14 App. Cas. at p. 435). Accordingly, if, owing to want of title in the vendor or otherwise, the contract comes to an end without any default on the part of the

purchaser, he is generally entitled to have his deposit repaid to him, with interest. But if, on the other hand, the contract goes off in consequence of some default on the purchaser's part, the vendor is generally entitled to forfeit and retain the deposit, even though there be not (as, however, there commonly is) a stipulation in the contract expressly providing for such forfeiture (*Howe* v. *Smith*, 1884, 27 Ch. D. 89).

It is, however, possible—as a recent case (*In re Scott and Alvarez' Contract*, [1895] 2 Ch. see pp. 614, 615) has shown—that there may be a contract of sale, in dealing with which the Court will decline to give the vendor a judgment for specific performance, on the ground that his title is one which Equity will not force on a purchaser, and, at the same time, will decline to give the purchaser a judgment for return of his deposit, on the ground that the contract under which he paid it is binding at Law:—a result of the double jurisdiction in Courts of Law and Equity, and the extraordinary jurisdiction exercised by Courts of Equity, which is more curious than satisfactory. (See also *In re National Prov. Bk. of England and Marsh*, [1894] 1 Ch. at p. 192.)

Interest and Rents.—Where there is no stipu-

lation in a contract of sale of land with respect to interest on unpaid purchase-money or the rents of the property sold, the general (but not universal) rule of the Court is that the purchaser, if he completes the contract after the time fixed for completion or at which he ought to take possession, is to be considered as in possession as from that time; and accordingly, as from that time until actual completion, he must pay interest (computed usually at the rate of four per cent. *per annum*), taking, on the other hand, as from the same time the rents, which up to that time are considered as belonging to the vendor. If, however, such interest is much more in amount than the rents, and it is clearly made out that the delay of completion was occasioned by the vendor, then, to give effect to the general rule would be to enable the vendor to profit by his own wrong; and the Court, therefore, gives the vendor no interest, but leaves him in possession of the interim rents (see *Paton* v. *Rogers*, 1822, 6 Madd. at p. 257; *Esdaile* v. *Stephenson*, 1822, 1 Sim. & St. at p. 123; and *Birch* v. *Joy*, 1852, 3 Cl. H. L. at pp. 590, 591).

But an express stipulation in the contract may, and often does, modify the general rule. It is, for instance, a usual stipulation that

interest shall be paid by the purchaser from the day fixed for completion until actual completion, "if, from any cause whatever," or (and, nowadays, more commonly) "if, from any cause whatever *other than wilful default on the part of the vendor*," completion is delayed beyond the fixed date. Such a stipulation is put in mainly by way of precaution, for the purpose of giving the vendor some hold over the purchaser. It is—particularly in the shorter unqualified form — obviously open to abuse: but, even where that form has been employed (*e.g. Williams* v. *Glenton*, 1866, L. R. 1 Ch. 200), it is very seldom that a vendor can take advantage of his own wrong, and compel the purchaser to pay interest, if the vendor is himself to blame (*In re Woods and Lewis' Contract*, [1898] 2 Ch. at p. 213).

Where the longer form has been used, questions have repeatedly arisen, and have been much debated, as to the meaning and scope of the expression "wilful default" in such a stipulation. "It is now settled that moral delinquency, intentional delay, wilful obstruction on the part of a vendor, may all be absent, and yet there may be wilful default on his part, disentitling him to interest [under such a stipulation]. If a vendor knows the material facts—

knows that there are difficulties which it is his duty to overcome—knows that he may not be able to overcome them by the time fixed for completion, and he fails to overcome them by that time, although no fresh unforeseen occurrence prevents him from doing so, the delay caused by such failure on his part is attributable to his wilful default, in the sense in which that expression is used in contracts of this description; and his right to interest during such delay is excluded" (*In re Hetling and Merton's Contract*, [1893] 3 Ch. at p. 281).

Recent illustrations of this topic are to be found in *In re Wilsons and Stevens' Contract* ([1894] 3 Ch. 546), where the vendor's omission to take steps to procure certain necessary admissions to copyholds was held to amount to wilful default; and in *North* v. *Percival* ([1898] 2 Ch. 128), where the vendors' repudiation of the contract by resisting the purchaser's claim for specific performance was held not to constitute such wilful default as to disentitle them to interest.

Due force is, of course, to be given to the epithet "wilful": there may be default by a vendor which falls short of being "wilful," in the sense attachable to that word in stipulations of the kind under consideration (*e.g. In re*

Mayor of London and Tubbs' Contract, [1894] 2 Ch. at pp. 536, 537).

Where it is a term of the contract that interest at a specified rate is to be paid, as from the time for completion, unless the vendor is guilty of wilful default, it is conceived to be the better opinion that the purchaser cannot escape from liability to pay such interest merely by setting apart the unpaid purchase-money on a deposit account at a bank, or even by investing it, and giving the vendor notice of the appropriation (*In re Riley to Streatfield*, 1836, 34 Ch. D. 386): though it may be otherwise where the contract contains no such term (*Kershaw* v. *Kershaw*, 1869, L. R. 9 Eq. 56).

CHAPTER XVII.

PROCEEDINGS AFTER JUDGMENT.

Inquiry as to Title.—Though this inquiry has so commonly been directed at the trial that it has been considered convenient to advert to it under the head of Proceedings after Judgment, it should be borne in mind that an order for such an inquiry is obtainable also, in an action for specific performance, on interlocutory application before trial, under Ord. XXXIII. r. 2, or by means of an application under Ord. XXXII. r. 6 (*e.g. Camberwell, &c. Society* v. *Holloway*, 1879, 13 Ch. D. at p. 758); and where the only question is that of title, the earliest practicable opportunity of applying for the inquiry ought to be embraced (*Phillipson* v. *Gibbon*, 1871, L. R. 6 Ch. at p. 435).

Indeed, in cases where title only is in question, an originating summons under the Vendor and Purchaser Act, 1874, will generally answer all purposes; for whatever can be done in chambers upon a reference for inquiry as to title under a

judgment in an action where the contract has been accepted, admitted, or established at or before trial, can also be done upon proceedings under the last-mentioned Act (*In re Burroughs, Lynn, and Sexton*, 1877, L. R. 5 Ch. at p. 604). But the Court is not disposed to allow a litigant to blow hot and cold; and a party to a contract, who has applied for and obtained an order under the Vendor and Purchaser Act, cannot afterwards maintain an action for specific performance, if he might have obtained all needful relief in the proceedings which he originally elected to take (*Thompson* v. *Ringer*, 1881, 29 W. R. 520).

A vendor may, if he likes, stipulate for the sale of an estate with such title only as he happens to have (*Freme* v. *Wright*, 1819, 4 Madd. at p. 365); and if he has done so, making the stipulation clear to the purchaser (*Southby* v. *Hutt*, 1837, 2 Myl. & Cr. at p. 212), there is no room for any inquiry as to title. Nor, again, will inquiry as to title be directed if it appears that the purchaser has expressly (*e.g.* by admission of the title in the pleadings), or impliedly (*e.g.* by some unequivocal act of ownership), waived his right to the inquiry, or where the only point or points in dispute upon the title is or are argued and decided at the trial.

Where inquiry in the common form (*supra*, p. 134) is directed, "a good title" means a good title *according to the contract* (*Upperton* v. *Nicholson*, 1871, L. R. 6 Ch. at p. 442); and accordingly, in making the inquiry, regard is had to any stipulations in the contract by which the purchaser's ordinary legal right to a good title (*supra*, pp. 121, 122) may have been curtailed.

Of such stipulations there are countless varieties. Two forms of common occurrence it may be useful to notice particularly, viz.: (i.) a stipulation to the effect that the purchaser is not to require the vendor to prove the title, or some specified part of it; in which case the purchaser is not precluded from showing *aliunde* that the title is defective; and (ii.) a stipulation to the effect that the title, or some specified part of it, is not to be inquired into; in which case the purchaser is precluded from making any inquiry whatsoever (see *In re National Provincial Bank of England and Marsh*, [1895] 1 Ch. 190, and the cases there reviewed; also *In re Scott and Alvarez*, *ibid.* 596, and [1895] 2 Ch. 603).

The general principles applicable to such restrictive stipulations are that they are to be construed strictly, and that effect will be given to them if clear, honest, and fair, but refused

if they are misleading or otherwise unfair (see *In re Banister*, 1879, 12 Ch. D. 131, 136, 142, 143). But, stringent though the conditions may be, the Court is not disposed, in the case of a contract for sale of land, to grant to the vendor the discretionary remedy of a judgment for specific performance, unless it sees that the purchaser will get at least a holding title to the land (*In re Scott and Alvarez' Contract*, 1885, 2 Ch. at pp. 612, 613, 615).

Affidavit evidence as to matters of fact is admissible on the inquiry as to title (*In re Burroughs, &c., supra*, p. 145); and a vendor is in time, as regards making out his title, if he makes a good title according to the contract before the signing of the Master's certificate (*Jenkins* v. *Hiles*, 1802, 6 Ves. Jun. at p. 655), or, it is conceived, in the case of a vendor and purchaser summons, before the evidence is closed. As to the difference between *showing* and *making* a title, see *Parr* v. *Lovegrove* (1857, 4 Drew. at p. 176).

Unless the certificate is varied on a proper application for that purpose, the Court, on the subsequent hearing, will generally direct specific performance, or dismiss the action, according as the certificate is in favour of or against the title. But where the certificate is against the title, or, being in favour of it, is varied, the

vendor is sometimes allowed a further opportunity of curing the defect (*Coffin* v. *Cooper*, 1807, 14 Ves. Jun. 205; *Portman* v. *Mill*, 1831, 1 Russ. & M. 696; *Curling* v. *Flight*, 1848, 2 Ph. Ch. 613).

As to the costs up to the time when a good title is shown, the conclusion to be drawn from a comparison of the modern authorities is, it is conceived, that these, like other costs of specific performance actions (*supra*, p. 137), are entirely in the discretion of the Court (see *Phillipson* v. *Gibbon*, 1871, L. R. 6 Ch. at p. 434, and *per* Cotton, L.J., in *Games* v. *Bonnor*, 1884, 33 W. R. at p. 66).

Inquiry as to title is not confined to cases relating to real or leasehold property. It has, for instance, been directed where shares in mining companies were the subject-matter of the contract (*Curling* v. *Flight*, *ubi supra*).

Non-compliance with Judgment.—Where, by a judgment, the defendant has been ordered to perform specifically his part of a contract, and he has made default in doing so, there are several remedies, of some or one of which, according to the circumstances of the particular case, the plaintiff may avail himself by means of application in the action—

(i.) He may obtain an order fixing a time

and place at which, or a limited period within which, the judgment is to be complied with by the defendant, and, in default of compliance with the order, he may proceed to enforce it by writ of *fieri facias*, or *elegit*, if the default be in payment of money, and, if otherwise, by writ of sequestration or attachment (*Grace* v. *Baynton*, 1877, 25 W. R. 506; Ord. XLII. rr. 3, 6, 8, 17, 24; Ord. XLIII. r. 6; Ord. XLIV.).

Where the judgment in a vendor's action has directed (1) an account to be taken of what is due to the plaintiff for purchase-money, &c. (2) a conveyance to be settled by the judge and executed as an escrow, (3) payment to be made by the defendant to the plaintiff, at a time and place to be appointed by the judge, of the amount certified to be due, and (4) delivery-over thereupon of the conveyance and other title deeds, the judgment is not a conditional one (Ord. XLII. r. 9) because of the direction for a conveyance. As soon as the certificate ascertaining the amount payable has been made, and the time and place for payment have been appointed, there is an absolute and unconditional order for payment of the sum of money so ascertained, on which, if not obeyed, process of execution may generally issue at once. The latter part of the judgment splits the contem-

plated transaction into two separate and distinct acts. There is, first, an absolute order to pay the money, and, secondly, an absolute order to deliver the conveyance and title deeds. But, such an order for payment to the plaintiff being a complete and final order, he is not entitled, if he omits to serve it and the defendant fails to pay, to get an order directing the defendant to pay the certified sum *into Court;* but he may have a four-day order for payment to himself personally, such an order being merely a working-out of, and supplemental to, the judgment (*Robinson* v. *Galland*, 1889, 37 W. R. 396; and see a similar order in *Jessop* v. *Smyth*, [1895] 1 I. R. at p. 510).

In an earlier case, in which the judgment had directed that, on the plaintiff (vendor) handing over a proper conveyance and the other title deeds, the defendant should pay the amount to be certified as due from him, and the plaintiff had tendered the conveyance and title deeds, but the defendant had refused to accept them, or to pay, North, J., did not give leave to issue execution at once, but made an order that the plaintiff should be at liberty to deposit the conveyance and title deeds in Court, and at the same time (subject to such deposit being made) made a four-day order on

the defendant for payment of the certified sum (*Bell* v. *Denver*, 1886, 54 L. T. N. S. 729).

(ii.) He may avail himself of the provisions of Ord. XLII. r. 30, by which it is provided that, if a judgment for the specific performance of any contract be not complied with, the Court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done, so far as practicable, by the party by whom the judgment has been obtained, or some other person appointed by the Court or judge, at the cost of the disobedient party, and upon the act being done, the expense incurred may be ascertained in such manner as the Court or judge may direct, and execution may issue for the amount so ascertained and costs (see *Mortimer* v. *Wilson*, 1885, 33 W. R. 927).

(iii.) If, being a vendor of land, he has been declared entitled to a vendor's lien, he may obtain an order for enforcement of his lien by sale of the land, with, in a proper case, the appointment meanwhile of a receiver; and further, if the land be unsaleable, he may in some cases (*e.g. Allgood* v. *Merrybent, &c. Rail. Co.*, 1886, 33 Ch. D. 571) obtain an injunction restraining the defendant from con-

tinuing to use the land, and an order that the plaintiff be put into possession of it.

(iv.) If he be a purchaser of land, he may obtain an order vesting the defaulter's estate in him, or appointing someone to execute a conveyance of it to him (Trustee Act, 1893, ss. 26, 31, 32—34 ; Judicature Act, 1884, s. 14).

(v.) He may, whether there has been a declaration of lien or not (*Baker* v. *Williams*, 1893, 41 W. R. 375), obtain an order rescinding the contract and staying all further proceedings in the action (*Henty* v. *Schröder*, 1879, 12 Ch. D. 666).

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